

IN THE UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF TENNESSEE
 AT KNOXVILLE

UNITED STATES OF AMERICA

Plaintiff,

v.

MARK HAZELWOOD,
 SCOTT WOMBOLD,
 HEATHER JONES, and
 KAREN MANN,

Defendants.

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Chattanooga, Tennessee
 January 12, 2018

BEFORE: THE HONORABLE CURTIS L. COLLIER
 UNITED STATES DISTRICT JUDGE

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JURY TRIAL
SIXTEENTH DAY OF TRIAL

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1 (The proceedings were held outside the presence of
2 the jury, as follows:)

3 THE COURT: Before we get started, let me take care
4 of a housekeeping matter. On yesterday I indicated that with
5 the expected length of the trial and the possibility that we
6 might be going into March, I wanted the jurors to examine their
7 calendars to see about their availability, and I commented that
8 one juror needs to be off from the 20th to the 27th. And I did
9 discuss that with the attorneys yesterday, and it turns out
10 that one of the attorneys has a problem with that Monday of
11 that week and another attorney has a problem with Thursday that
12 week. So they'd like to have that entire week off, also. So
13 that will take care of it. So we will be taking off the week
14 of January 20 through the 27th. And I think the week actually
15 starts on the 22nd, so -- not on the 20th. So that means that
16 that juror's mind can be relaxed and the juror can attend that.

17 Now, there is another issue I need to bring up with
18 the attorneys concerning a juror. And I should have asked to
19 have the jury wait to come in until I do that. Let me have
20 the jury step out for just a bit.

21 (The jury exited the courtroom, and the proceedings
22 continued as follows:)

23 THE COURT: Please be seated. This is more for
24 information and to see if anybody would like any further
25 inquiry. As a result of my informing the jury yesterday that

1 I'd like to go forward with the trial, to the extent that we
2 could, and I suggested one juror examine her travel schedule to
3 see if that conflict could be resolved, I was informed about,
4 oh, I guess 6:00 or so yesterday that juror wanted to contact
5 someone in the clerk's office to talk about her obligations.
6 And instead of talking to someone in the clerk's office, she
7 actually talked to one of the clerical people in the U. S.
8 Attorney's Office, unbeknownst. And that person directed her
9 to speak to someone in the clerk's office. So there was a
10 contact between a juror and someone on the prosecution team
11 yesterday afternoon.

12 That juror was Ms. -- is it McKrystal? The one
13 who's going to be off the week of the 20th through the 29th,
14 that was the juror. So I've not talked to her at all, and I'm
15 passing on to you what I was informed by the clerk's office.

16 Mr. Hamilton?

17 MR. HAMILTON: I'm trying to gather information about
18 it at this moment myself. What --

19 (Off-the-record discussion between government
20 counsel.)

21 MR. HAMILTON: Okay. I'm trying to establish what
22 occurred, Your Honor. My understanding-- I need to find
23 Ms. Russell. Can we just take a moment so I can-- At this
24 point all that I understand-- First I heard about this is when
25 you just advised the parties of this situation. What I'm

1 hearing—we're going to go see if we can find Ms. Russell
2 herself—is that it was more -- it was directional, I believe,
3 as in an encounter in the hallway. But we need to talk to
4 Ms. Russell about it. I don't -- based on what I'm hearing, I
5 don't see any issue there.

6 THE COURT: And I was mistaken. It was not the one
7 who has a conflict with the week of the 20th. It was actually
8 Ms. Sellers, the one who is relocating to Knoxville. So her
9 name is also Krista. So I was confused as to which Krista it
10 was.

11 MR. HAMILTON: So it's Ms. Sellers, then --

12 THE COURT: It's Ms. Sellers.

13 MR. HAMILTON: -- who is probably going to be --

14 THE COURT: Yes.

15 MR. HAMILTON: -- leaving anyway? Well, I certainly
16 want to get to the bottom of it, whether she's leaving or not,
17 but...

18 Ms. Russell, of course, as the Court knows, is a
19 witness coordinator, who is often in the hallway coordinating
20 witnesses. And so I could see how something like this could
21 happen. Would you like for me -- would you like for us to
22 carry on? Would you like for us to find her so --

23 THE COURT: I wanted to let you know. I wanted to
24 let the parties know about it, since there was a contact. From
25 what was told to me, it appeared to be innocent, but I have not

1 investigated it at all.

2 MR. HAMILTON: Sure.

3 THE COURT: I know nothing more than what was related
4 to me by our division manager here.

5 MR. HAMILTON: So I guess -- may I ask the Court
6 to --

7 (Off-the-record discussion between government
8 Counsel.)

9 MR. HAMILTON: Your Honor, I think it might be best
10 to hear it directly from Ms. Russell, if the parties would like
11 to hear it. That's really where we are on it, so...

12 THE COURT: I'll leave it to up the parties. I have
13 reported it. If anybody would like further inquiry, that's
14 fine. If you'd like to investigate it, that's fine. But I
15 just wanted to let everybody know what I had been informed.

16 MR. HARDIN: I think it would be helpful if we heard
17 from her what she knows about it, if the Court's --

18 THE COURT: Very well.

19 MR. HAMILTON: Well, so should we -- I'll ask the
20 Court to ask the parties, do you want to put her under oath and
21 ask her the questions?

22 THE COURT: It's up to the parties. It's up to you.

23 MR. HAMILTON: I don't think that's necessary, but
24 it's not -- again, I want to defer to defense counsel on this
25 situation.

1 MR. HARDIN: I don't require it from our standpoint.
2 I can't speak-- I'm not that concerned about the oath. I just
3 would simply like to-- I, quite frankly, have encountered this
4 lady before, and I trust she's going to tell the truth. So I'm
5 not so interested in the oath. It's just to tell us what
6 happened.

7 THE COURT: Why don't you have her stand, then, and
8 recount what happened.

9 MS. RUSSELL: On the stand?

10 THE COURT: No, you can do it from there. Just speak
11 loudly.

12 MS. RUSSELL: I was out in the hallway escorting our
13 witnesses up the stairs. I had come back down. The juror was
14 standing outside the clerk's office. Of course it was after
15 5:00. The door was locked. She said, "I need to get to
16 Barbara."

17 I said, "Barbara is still in the courtroom, but I
18 can call Russ Eslinger," who I know is over the clerk of the
19 court, the administrative section, I believe. I called him
20 immediately on my cell phone. He came immediately out of his
21 office. I walked away. That was the only transaction I had
22 with her.

23 MR. HARDIN: That satisfies Mr. Hazelwood, Your
24 Honor.

25 THE COURT: Okay.

1 MR. VERNIA: And Ms. Jones, Your Honor.

2 MR. COOPER: Thank you, Your Honor. That's all.

3 MR. RICHARDSON: That's fine from Mr. Wombold's
4 perspective.

5 MR. HAMILTON: Your Honor, I'm going to ask
6 Ms. Russell just to tell everyone approximately when it
7 happened.

8 MS. RUSSELL: It was approximately 5:15.

9 MR. HAMILTON: What day?

10 MS. RUSSELL: Yesterday. The 11th. January 11th.

11 MR. VERNIA: Thank you.

12 THE COURT: And I was informed -- I thought it was
13 closer to 6:00. It may have been earlier than that. My
14 assumption would be Mr. Eslinger spent some time talking to her
15 and at some point came up to my chambers and reported to me.
16 So I was in my chambers having discussions with staff.

17 MS. RUSSELL: I immediately passed her off to Russell
18 Eslinger. So I don't know if that was the confusion, since my
19 last name is Russell. But that was my only conversation with
20 her, was to contact him.

21 THE COURT: Thank you.

22 MR. VERNIA: Your Honor, I have a couple of small
23 matters to raise before the jury's brought back in. First,
24 there is the media hearing at 1:15. Is it acceptable if our
25 clients are absent for that? I don't think there is going to

1 be any evidence taken.

2 THE COURT: Yeah, I don't think there is any
3 requirement. There won't be any evidence presented. It will
4 just be arguments about facts already in and law. I think I'm
5 going to depend upon counsel to put the facts on the record.

6 The attorney representing the media, unless that
7 attorney has read the transcript very carefully, really will
8 not have much idea of what the facts are. And that attorney
9 will likely be well-versed in the law, but we have to apply
10 law to facts. So I think counsel will be very helpful in
11 making sure that we have a solid factual foundation in the
12 record that will support whatever decision is made.

13 MR. VERNIA: Thank you, Your Honor. The other thing
14 that I wanted to raise, and I apologize that it occurred to me,
15 as a lot of things do, too late in the day yesterday, but I
16 have some more voir dire for Mr. Seay. And under Rule 104(c),
17 the jury need not be present for that.

18 And I apologize for not asking the Judge about this
19 last night, because the jury may have been able to come in a
20 little bit late this morning. But I'm satisfied with
21 proceeding with the jury still out. I think it actually may
22 expedite the process a little bit, because -- well, hopefully,
23 if there's objections that Mr. Hamilton has, simply because he
24 doesn't want the jury to hear something, that he may be able
25 to forgo some of that, but I don't want to promise too much.

1 MR. HAMILTON: The government has no objection with
2 proceeding with this outside the presence of the jury if that
3 will expedite it.

4 THE COURT: You know, I really don't like having the
5 jury here and not making the best use of their time. I'm
6 pulling out Rule 104, and I'm going down 104(c), and 104(c)
7 states that the Court must conduct any hearing on a preliminary
8 question so that the jury cannot hear it if (1) the hearing
9 involves the admissibility of a confession. I don't think a
10 confession is at issue here, so I'm assuming that does not
11 apply. (2) the defendant in a criminal case is a witness and
12 so requests it. And I don't think that applies. And third is,
13 if justice so requires. Now, obviously, that's pretty broad.
14 It doesn't give the Court much guidance. I'm assuming that's
15 the one that we are talking about.

16 MR. VERNIA: Yes, sir.

17 THE COURT: So why don't you tell me why justice
18 requires an out-of-court hearing.

19 MR. VERNIA: Well, Your Honor, I think that it's in
20 the interest of everyone, including the jury, that we move
21 along as quickly as possible. I think that the jury may find
22 some of this testimony confusing, since it goes to very
23 technical issues of admissibility. And that process may, in
24 fact, distract the jury from the genuine substance of
25 Mr. Seay's testimony on direct and cross-examination.

1 So I agree that it is somewhat of a borderline case,
2 but I think that a strong argument nevertheless exists that
3 the entire trial would be better served by proceeding outside
4 the presence of the jury.

5 THE COURT: Well, I think you counsel have been
6 involved in so much that you've become normalized to this
7 evidence, but I think I do and I think the jury will probably
8 find that much of the evidence in this case has been very
9 technical and confusing.

10 I've learned about diesel fuel markets and discounts
11 and rebates and whatnot, cell phone technology, computer
12 infrastructure. And I can't imagine that there's going to be
13 too much in the -- this witness's testimony that's not going
14 to be as confusing and complicated as what they've already
15 heard.

16 MR. VERNIA: Your Honor, but most of that other
17 testimony does in some way relate to the merits of the case. I
18 think, in this case, many of the questions that I have really
19 relate to the grounds of admissibility, whether this
20 information is reliable and trustworthy, whether it can be used
21 in a court of law in the manner that the government is
22 intending to do. It's not going to be ultimately -- the jury's
23 not going to ultimately need to know those underlying facts to
24 assess Mr. Seay's testimony on the merits.

25 So I do agree that the case has involved some

1 confusing evidence before, but I think that this genuinely
2 falls under the preliminary questions issue that the jury is
3 not really going to need to hear.

4 THE COURT: Well, all foundational issues are
5 preliminary, but part of the reason that we have a foundation
6 laid is so that the jury can have some basis for determining
7 how much weight to give particular testimony. And especially
8 when there is an opinion being offered, the jury should be
9 given some information as to whether they should or should not
10 give weight, and, if so, how much weight to give the particular
11 witness. So that's some of what we're doing here. And I think
12 it would be beneficial for the jury to hear it, even if much of
13 the testimony is going to be very technical and very confusing.

14 Assuming that the witness is allowed to offer that
15 testimony, the parties should be able to argue to the jury
16 that this testimony should be credited or should be
17 discredited. And some of the basis for the jury's decision
18 ought to be the foundation that was -- that was presented.

19 So the Court is going to overrule the objection.
20 The Court looked at Rule 104. The Court has heard the
21 arguments presented in favor of having the witness testify
22 outside the presence of the jury. The Court has already
23 indicated that its preference is to make as much use of the
24 jury's time as possible. So the Court will have the jury come
25 back in, and we'll proceed.

1 MR. VERNIA: Thank you, Your Honor.

2 MS. BREVORKA: Your Honor, if I may.

3 THE COURT: You may.

4 MS. BREVORKA: Just a point of clarification, given
5 the Court's breaking of the testimony into direct about
6 foundation and cross about foundation, Mr. --

7 THE COURT: At the request of counsel.

8 MS. BREVORKA: Yes. My request is, Mr. Hazelwood has
9 a few foundational questions after Mr. Vernia, and I just
10 wanted to make sure procedurally if we may follow.

11 THE COURT: The Court assumed that any of the
12 defendants who wanted to also conduct voir dire would have that
13 right. Mr. Vernia, he just asked initially, and I think he
14 took advantage of the opportunity to go first. But the Court
15 was always operating under the assumption that was a right
16 available to all counsel.

17 MS. BREVORKA: Thank you, Your Honor.

18 MR. VERNIA: Your Honor, we had discussed the order
19 in which we would go.

20 THE COURT: And I think I've said at some point that
21 the Court's going to leave it up to counsel to determine the
22 order, and if they could not agree, we'd go in the order of the
23 indictment. I believe that I said that maybe at the pretrial
24 or some point?

25 MR. VERNIA: Yes, sir.

1 MR. HARDIN: Yes, sir.

2 THE COURT: So are we ready for the jury?

3 MR. VERNIA: Yes, sir. Thank you.

4 (The jury entered the courtroom, and the proceedings
5 continued as follows:)

6 THE COURT: Please be seated.

7 You may proceed, Counsel.

8 MR. VERNIA: Thank you, Your Honor.

9 VOIR DIRE EXAMINATION

10 BY MR. VERNIA:

11 Q Good morning, Mr. Seay. How are you?

12 A Good. Thank you.

13 Q All right. I want to discuss with you the Power
14 Pivot Manual Rebate Tool. And like Mr. Hamilton, I'll refer
15 to it probably as the manual rebate tool.

16 A Okay.

17 Q All right. Thank you, sir. And I want to discuss
18 the data sources of that and a little bit about the structure.
19 And I'm going to show you -- I'm going to show you a chart.
20 And we'll talk about the components of it. But along the top,
21 on either side of the letter A, you'll see there's written
22 "PC9 PROD/STORETRAN"—and I'm going to have to spell this for
23 the court reporter later—as well as "PRS" and "Price Fetch,"
24 and then there is "Ascend" and "Lawson" all the way across the
25 top. Do you see those?

1 A (Moving head up and down.)

2 Q Are those four data sources that were used in the
3 manual rebate tool?

4 A The ones on the left, yes, the STORETRAN database,
5 PRS, and Price Fetch --

6 Q Okay. What is --

7 A -- were.

8 Q Excuse me.

9 A Excuse me. Price Fetch is where the data was
10 retrieved from, but PRS was the ultimate source.

11 Q Okay. What is the STORETRAN database?

12 A The STORETRAN database is -- so this is what we
13 discussed yesterday in our Lawson. So PC9 PROD is the server
14 that contains the STORETRAN database. It's a database within
15 our Lawson environment. Lawson, again, is a software,
16 third-party software, that contains a variety of what I refer
17 to as modules, so our general ledger financial system, we also
18 have an accounts payable system, HR, we have payroll
19 functionality in there as well.

20 And in this case we have a internally developed user
21 interface -- well, the user interface we leverage from Lawson
22 system, and so we internally developed these user interfaces
23 that would facilitate our business process.

24 In this case the retail pricing team utilizes a user
25 interface out of our Lawson system, which the database behind

1 that user interface which contains the retail pricing that we
2 utilize for the tool is entitled STORETRAN.

3 Q All right. And was that in use prior to the search?

4 A Yes.

5 Q So the retail pricing information was routinely
6 stored in STORETRAN prior to the search?

7 A Yes.

8 Q Was that information ever revised?

9 A Not to my knowledge.

10 Q Was it ever audited for accuracy?

11 A I wouldn't have been involved, so I can't attest to
12 that.

13 Q Do you know whether there was an audit trail
14 associated with that data?

15 A I assume so. I did not support the system, so that
16 was not my responsibility.

17 Q Do you know what an audit -- can you explain what an
18 audit trail is, to your understanding.

19 A I'm assuming you're referring to either log files or
20 some way of capturing any changes that were made to that
21 database.

22 Q Yeah, that's what I'm talking about.

23 A Okay.

24 Q So I'll probably use that going forward, and we can
25 understand each other on that.

1 A Okay.

2 Q Was the version of STORETRAN that you used, was that
3 the version that existed prior to the search, or were you
4 using it during the audit process from the live STORETRAN
5 database at Pilot?

6 A I believe we captured a copy of that database at the
7 time of our process. So it would have been subsequent to the
8 raids, but it would have been at a definitive time, and it was
9 not live.

10 Q Do you know whether that's the case, or are you just
11 assuming that's the case?

12 A I think that's the case, but I'm not a hundred
13 percent certain, so...

14 Q All right. How did you get the data out of
15 STORETRAN?

16 A It was provided to us by another department that
17 retrieved it for us and supported the system.

18 Q What department was that?

19 A I believe it was IT, so...

20 Q Is STORETRAN a SQL-based database; do you know?

21 A It's Oracle.

22 Q It's Oracle?

23 A Oracle.

24 Q And does Oracle use a specialized language for
25 querying the database?

1 A Yes, it does.

2 Q Are you familiar with that language?

3 A I am.

4 Q Did you write the queries that pulled the database
5 or the data in question out of STORETRAN?

6 A I reviewed them, but I did not write them, no.

7 Q Who wrote them?

8 A IT.

9 Q Was this part of the information on Lawson that was
10 provided to the defendants?

11 A Yes.

12 Q All right. Let's move on to the next box, PRS
13 and -- well, two boxes, I suppose, PRS and Price Fetch.

14 A Uh-huh.

15 Q You said that the PRS data, you pulled the
16 information out of Price Fetch, but it was coming originally
17 from PRS. Is that right?

18 A Correct. PRS would supply us with the data files.
19 Those files would be loaded into the Price Fetch system.

20 Q Okay. And we're not talking about the audit
21 process. We're talking about on a routine basis that
22 happened.

23 A Correct. That's the normal course of business.
24 That's what is performed.

25 Q Okay. PRS is not part of Pilot Travel Centers, is

1 it?

2 A No. It's a third party.

3 Q You can't testify that PRS data was created at or
4 near the time of the activity -- or you can't personally
5 testify that that's the case, right?

6 A No.

7 Q And, likewise, you can't testify that it was made in
8 the course of a regularly conducted business activity of Pilot
9 Travel Centers, right?

10 A I believe it was.

11 Q Well, did PRS create it for Pilot Travel Centers?

12 A Well, no. They would provide those data files to
13 all their clients, customers.

14 Q All right. But you don't personally know that that
15 was happening prior to the search, right?

16 A I was familiar with the process, but not at the
17 depth, of course, I became after the audit.

18 Q Well, who told you that this was how the process
19 worked?

20 A We worked with both our IT department and the
21 accounting team that utilized the system as well.

22 Q And did you learn that before, or after, the search?

23 A Most -- I mean, again, my -- I was familiar with it
24 prior to April 2013; however, yes, the intricacies of the
25 process I learned subsequently.

1 Q Okay. And, I'm sorry, you maybe answered this
2 question, but who -- where did you -- how did you learn that,
3 the intricacies?

4 A Just working within Pilot, obviously, I had a
5 familiarity with some of the data sources that were available,
6 just due to working in proximity to and working on other
7 projects. I was aware of the Price Fetch system, I was aware
8 of the data that was contained in there, but we wouldn't -- we
9 did not use it as normal daily business, but I was aware.

10 Q And -- I'm sorry, I was asking you, though,
11 specifically about the intricacies. Did you answer that?

12 A I'm sorry. Can you repeat the question?

13 Q How did you learn about the intricacies? I think
14 you said that after the search you learned the intricacies of
15 it.

16 A Correct. So after the search, you know, as a
17 technical lead on the project for the audit, I met with the
18 various IT departments that supported these systems, also the
19 business partners that utilized these systems, to help develop
20 a better understanding of what the process was and the data
21 that was represented.

22 Q And who specifically did you talk to about Price
23 Fetch?

24 A Other members of the audit team that had worked
25 gathering the insight. I believe -- I know I've spoken to

1 Nass- -- Nasser Hishmeh was our primary contact within the IT
2 organization. And then -- well, Cory Shupp as well. He
3 was -- he was in accounts receivable at the time, I believe.
4 And he was knowledgeable as well, so...

5 Q Let me move on to Price Fetch itself. What is Price
6 Fetch?

7 A So Price Fetch was developed -- internally developed
8 software that helped with the scheduling and the distribution
9 of the summarization of the customer data that was originated
10 from PRS.

11 Q Is it a database system?

12 A Yes.

13 Q What's the -- what is the technology on which it's
14 based?

15 A I believe that one is SQL.

16 Q So like a SQL server?

17 A Microsoft SQL server, yes.

18 Q And so that's using SQL --

19 A Correct.

20 Q -- queries?

21 A Uh-huh. Yes.

22 Q I'm sorry. I may have talked to you about this
23 before, but I'll try to not start talking before you finish
24 answering, and vice versa. That --

25 A Okay.

1 Q -- would be good. Thanks.

2 So you got the information -- or your team got the
3 information out of Price Fetch using SQL queries.

4 A Correct.

5 Q Were you --

6 A Well, actually it was provided by IT, was the one
7 that provided us the information out of Price Fetch, utilizing
8 SQL queries. We did not query directly.

9 Q Did you write the SQL queries?

10 A No, I did not.

11 Q Who did?

12 A A member within the IT organization.

13 Q Is Price Fetch -- is it -- is that -- I think -- let
14 me ask you first: Were you working with an archived version
15 of Price Fetch, or were you working with an active version of
16 Price Fetch?

17 A I believe it was active.

18 Q And you understand what I mean by the difference
19 there?

20 A Correct. I do.

21 Q Maybe -- could you explain your understanding of
22 that?

23 A So we would refer to what you mentioned as active as
24 production, so -- or a live system used in the normal course
25 of business. An archive would be a copy of a production or

1 live system that would be held and ideally unchanged.

2 Q Okay. So you-- I'm sorry. I needed more coffee
3 this morning. Did you say you were working with the archive,
4 or production, system?

5 A I believe it was the production system.

6 Q Okay.

7 A It was a snapshot. We captured a one-time pull, I
8 believe, of the data. So, in essence, we were working with a
9 copy of it, but it was obtained from the live system at the
10 time.

11 Q Before, or after, the search?

12 A It was after the search.

13 Q How long after the search?

14 A Sometime within -- I would assume it would be within
15 a month or two after the search.

16 Q But you don't know?

17 A I -- we were -- I believe it was probably four or
18 five weeks, at a minimum. I joined the audit team probably
19 two weeks subsequent to the event. So within a very short
20 period of time it was -- I believe is when it was captured.
21 So I'm guessing four to five weeks.

22 Q Is Price Fetch -- does that -- does that particular
23 system have an audit trail function?

24 A I'm assuming we have log files, yes, but I -- again,
25 I don't support that system, so I'm not aware for sure.

1 Q So you don't know -- you can't testify whether that
2 data has been changed in any way?

3 A I cannot, not prior to our capturing it.

4 Q In the course of your audit, did you learn that in
5 fact Price Fetch data was changed?

6 A Not to my knowledge, no.

7 Q Okay. Was Price Fetch data audited for accuracy?

8 A Yes. I think that was-- In part of our normal
9 course of business, we have accounts receivable teams that
10 would validate our store transactions versus the transactions
11 we received. I know there was a full audit on the Ascend
12 data, I believe there was as well on Price Fetch data, so...

13 Q Do you know whether Price Fetch data was provided to
14 the defendants in discovery?

15 A Do I know when it was?

16 Q Was it, at all?

17 MR. HAMILTON: Objection, Your Honor. How does this
18 relate to foundation, what was provided to the defense in
19 discovery from this witness?

20 THE COURT: Counsel?

21 MR. VERNIA: It goes to, Your Honor, whether the
22 defendants have had adequate chance to assess the integrity of
23 the results.

24 MR. HAMILTON: Well, Your Honor, I can represent on
25 behalf of the United States what was provided to the defense in

1 discovery.

2 MR. VERNIA: Your Honor, there's a difference,
3 though, between-- I'm not -- I'm certainly not challenging
4 Mr. Hamilton's integrity on this. I'm simply saying it appears
5 that, unlike a lot of other data sources, that the Price Fetch
6 data was not even essentially captured for purposes of
7 Mr. Seay's work until weeks after the search; I think -- and it
8 has never been provided to the defendants.

9 Now, certainly Mr. Seay and his team, and I suppose
10 the IT team, he's just testified, could have pulled the
11 correct data, but we simply have no way of knowing that. We
12 have no way of verifying it. We did get copies of the Lawson
13 and Ascend databases, but we have had no access to this
14 information apart from --

15 MR. HAMILTON: Your Honor, I'm going to object to
16 this, because this is not appropriate for this context. This
17 was never asked for by the -- to the United States. The proper
18 disclosure was made for this witness under Rule 1006, and this
19 has been litigated, and this has never been raised.

20 MR. VERNIA: Your Honor, we raised it --

21 THE COURT: I think what we should focus on is
22 whether the witness's testimony is rationally based upon the
23 witness's perception, and whether the witness's testimony would
24 be helpful to the jury. Even assuming this witness had some
25 obligation to supply discovery to the parties, which obviously

1 he did not and does not, I'm not sure how his failure to do so
2 could affect his perception and the determination of whether it
3 was rationally based or whether his testimony would be helpful
4 to the jury.

5 MR. VERNIA: Thank you, Your Honor. I'll move on.

6 THE COURT: I think those are two key factors that
7 the Court must decide here, isn't it, whether his testimony is
8 rationally based and whether it would be helpful to the jury?

9 MR. VERNIA: Your Honor, I think you're right, and I
10 will withdraw the question and move on.

11 MR. HAMILTON: And will the United States have an
12 opportunity to provide representations about what was provided
13 with respect to this witness, based on what Mr. Vernia has said
14 here?

15 THE COURT: I, sometimes speaking to young lawyers
16 just starting out and learning about trial work, tell them that
17 it's good to compare a trial to a football game. And the
18 object of a football game is to advance the ball down the
19 field. You want to get it across the goal line. The object of
20 the game is not to buy popcorn, to engage in discussions with
21 spectators, or do other things. So let's keep our focus on
22 what we're trying to do.

23 What we're trying to do is to question this witness
24 and see whether he has the proper knowledge and whether he has
25 the ability to give helpful testimony to the jury. And these

1 other things, we're looking at pretty people in the stands.
2 Let's focus on the ball and getting the ball down the field.

3 MR. HAMILTON: Thank you, Your Honor.

4 MR. VERNIA: Thank you, Your Honor.

5 BY MR. VERNIA:

6 Q Mr. Seay, I'll move on. I believe I asked you a few
7 moments ago whether data in Price Fetch could be changed by
8 users at Pilot.

9 A Not to my knowledge. Well, the discounts,
10 potentially, but not the source billing service data that was
11 received from PRS.

12 Q All right. Who had access to the Price Fetch
13 database?

14 A From the raw -- what I refer to as the raw data
15 within the database, that would be IT.

16 Q And do you know whether there were -- whether there
17 were settings in the data that would prevent someone from
18 changing information?

19 A I'm not aware. I did not support that system.

20 Q All right. Let's move on to Ascend. And you've --
21 which was also -- I think it was referred to yesterday as
22 Ascend/PMIS?

23 A Correct.

24 Q And you said that that was another database?

25 A Another SQL server database --

1 Q Another --

2 A -- yes.

3 Q Sorry. And how did you get the data -- how did your
4 team get the data out of Ascend/PMIS?

5 A We were provided a query written by IT, which was
6 the team that was supporting the Ascend system, which we
7 utilized for the audit.

8 Q So you did not -- you and your team did not write
9 your own query for that?

10 A No. We reviewed the query for relevance, but, no,
11 we did not write the query.

12 Q Do you know whether the Ascend/PMIS data was ever
13 revised?

14 A Not my knowledge.

15 Q Was it capable of being revised?

16 A I assume so, but I don't know what controls the IT
17 department put in place for that, so...

18 Q Was it audited for accuracy?

19 A Yes. I believe it was.

20 Q How do you know?

21 A It definitely-- Well, I met with the accounts
22 receivable department extensively on their audit -- their
23 reconciliation process. They would perform-- So we have our
24 point-of-sale system, which contains the transactions that
25 occur at our retail locations. Obviously there's dollar

1 amounts associated with that, and volume, or gallons in this
2 case. They would perform-- They're responsible for making
3 sure that Pilot pays what they owe and only what they owe. So
4 they would reconcile the point-of-sale transactions so that
5 the monies we received or the -- obviously the credit card
6 transactions, and in this case what we refer to as billing
7 service transactions, were accurate.

8 We would then compare those transactions with the
9 transactions that were loaded into the Ascend system, and then
10 they would reconcile to make sure that all transactions in one
11 system were matched to the other system, to ensure that both
12 were reflecting the accurate truth.

13 Q So that -- so it was audited for accuracy in the
14 course of your audit?

15 A We -- yes, we audited their process to make sure
16 that we could rely on that data, yes.

17 Q All right. Was the version of Ascend that you were
18 using, Ascend -- excuse me -- Ascend/PMIS that you were using,
19 was that a archive, or a production?

20 A I believe it was a production system.

21 Q All right. So if there were changes that were made
22 to the data, assuming that there were changes made to the
23 data, that system would differ from the one that the
24 defendants possess, correct?

25 A Well, we -- at this current time -- it's possible,

1 yes.

2 Q Okay. Let's move on to the final one, which is
3 Lawson, which I think you referred to as the enterprise
4 tool --

5 A Um-hmm.

6 Q And that's an Oracle --

7 A Correct.

8 Q -- product? And that's -- when we were discussing
9 STORETRAN, that was part of that, right?

10 A Yes. That's a -- yeah, Lawson and STORETRAN, in
11 this case, would be synonymous. That's the same system.

12 Q Okay. And how did you get the data out of the
13 enterprise tool, the one we talked about?

14 A The Lawson information that was utilized was the
15 same in both scenarios that we've already discussed.

16 Q Was it using the Oracle queries?

17 A Correct, yeah.

18 Q Did you personally design those queries?

19 A No.

20 Q Who did?

21 A The IT department.

22 Q How do you know that the Lawson data is reliable?

23 A During the course of fuel accounting, my initial
24 employment with Pilot, we would commonly -- well, that was the
25 same source of data that we would use commonly for the fuel

1 margin reporting that we did daily and monthly. So we did
2 extensive research whenever there was questions that were
3 raised based on a store's profitability. In that case, we
4 would go back if -- if we were able to determine that the
5 retail price was -- needed investigation, we commonly would
6 review how that data would align with the actual transactions
7 occurring at the store. And I have high confidence in that
8 system, so...

9 Q And was it -- was it routinely audited for accuracy
10 as a normal part of the business operations of Pilot?

11 A I would assume so, but I was not involved, so...

12 Q All right.

13 A We validated it when we -- during the audit, when we
14 used it as a source --

15 Q During the audit.

16 A -- yes.

17 Q All right. Let's talk a little bit about Power
18 Pivot. But I think I first want to clarify, the manual rebate
19 tool and the off-invoice tool, did you personally create
20 those?

21 A So my role, I technically supervised the role. I
22 had an employee on my team-- There was two primary people
23 that would -- that did the development. One of them was on my
24 team, had extensive knowledge in Power Pivot and the language
25 it used. So he was -- would have -- be able to create it much

1 more efficiently than me. So when it came time to construct
2 the application, it's something I probably could have done,
3 but it would have taken me a lot longer, and it probably
4 wouldn't have been as efficient. So we relied on someone who
5 had that expertise in Power Pivot.

6 Q And who is that?

7 A Austin -- Austin Wendell on my team. He reports --

8 Q Okay.

9 A -- to the business intelligence department.

10 Q I'm sorry, I interrupted you. Were you going to
11 continue?

12 A So, my -- just to clarify my role. So I would help
13 Austin as -- during his development, I was helping supply the
14 business rules and calculations to implement to make sure that
15 it was accurate, and I also validated the results of the tool
16 extensively along the way.

17 Q And how was the tool tested for reliability and
18 accuracy?

19 A So, specifically with the off-invoice data, the
20 discounts that were applied historically remained in the
21 system. So we had effective dates and discount terms
22 historically for virtually all the accounts within Ascend.

23 So what we initially did as we were developing the
24 tool is, we would then take some of our larger accounts that
25 had transactions at the majority of our locations, we

1 would what we refer to as reprice, so we would calculate the
2 discount for that -- those customers based on what was
3 historically applied in the system, to make sure the output of
4 the tool matched what the customers originally were
5 discounted.

6 We commonly, as well, when we were to go to reprice
7 an account during the audit as well, part of the training
8 exercise or process that we documented was to initially
9 reprice -- you know, bring in the information, and before you
10 enter in the discount terms that were identified during the
11 audit, to go ahead and reprice the account at the original
12 discount terms that were identified in the system, just to
13 make sure that we did not see any material differences in the
14 output of the original invoice in the tool. Then we would go
15 to apply the actual discounts that were identified during the
16 audit, to determine an amount due. So that was -- and I was
17 not the only one performing that. That was common amongst
18 anyone that was operating the tool.

19 Q Okay. I think you described Power Pivot as under --
20 as being an add-in for Microsoft Excel?

21 A Correct. It's now -- it's now -- the newer
22 versions -- the ones we used at the time were add-ins, but now
23 it's actually a foundational component of Excel Office that
24 you can buy today, so...

25 Q Okay. If you look at my little diagram here, the

1 rounded box with the C on the inside --

2 A Yes.

3 Q -- the lower box, where it says spreadsheet, that
4 would be what the user would see when they open up the Excel
5 document?

6 A Correct.

7 Q But underlying that is a data model. Is that right?

8 A Correct.

9 Q And the data model consisted of a number of tables
10 and relationships amongst those tables?

11 A Correct.

12 Q And then the spreadsheet itself queries the data
13 model. Is that how that works?

14 A Yes.

15 Q How did you learn to use Power Pivot?

16 A We were -- we had licensing for Microsoft products
17 within our organization, so we had access to that tool. We --
18 as -- my department, Business Intelligence, even prior to my
19 transitioning to that role, had been utilizing that tool to
20 help construct data models in this case, to be able to solve
21 business scenarios. So it was a tool we had already been
22 using.

23 Q Have you ever had any classes in this product?

24 A I've taken some on-line tutorials and training items
25 on it, but...

1 Q Do you have any certifications in its use?

2 A I do not, no.

3 Q Do you belong to any professional organizations that
4 deal with this product?

5 A We had -- it wasn't a professional organization, but
6 we commonly would partner with Microsoft themselves, to help
7 beta test their products, give them feedback. They would
8 then, in turn, help us with additional trainings and
9 opportunities to see additional products and such, but...

10 Q Is there a special program in your database language
11 that's used in Power Pivot?

12 A There's DAX, D-A-X.

13 Q Can you spell that? D-A-X?

14 A D-A-X.

15 Q DAX. Have you learned DAX?

16 A Yes.

17 Q So it's fair to say that Power Pivot is a
18 specialized area, isn't it?

19 A It's a specialized tool, yes.

20 Q It's not something that a typical Excel user would
21 understand?

22 A Not without training, no. They could utilize a
23 created tool fairly efficiently, but not to develop one
24 themselves.

25 Q If you look at the drawing, I think you can see that

1 it represents data flowing from the various sources we
2 discussed into the -- into the Power Pivot Manual Rebate Tool.
3 And I think that you've discussed before that -- in talking to
4 Mr. Hamilton, that some of the information was coming from --
5 from real source -- from outside sources. Correct me if I'm
6 wrong, but it's true, isn't it, that you could have an Excel
7 Power Pivot tool in which all the data essentially resides in
8 that document?

9 A That's correct.

10 Q And you could also have one in which some of the
11 tables that we were talking about in the data model are
12 pulling information from on -- from sources over a network of
13 some sort?

14 A Correct.

15 Q Or from another program running on the same device?

16 A Correct.

17 Q Okay. In the case of the tools that you -- that
18 you're talking about that underlie your testimony today, were
19 those static, were they -- everything embedded in the
20 document, or were they interconnected with other programs or
21 devices?

22 A A combination. We utilized both.

23 Q Do you know whether the ones that were provided to
24 the defense are the same way? Are they static, or are they
25 interconnected?

1 A The Power Pivots themselves?

2 Q Yes.

3 A Yeah, they were -- well, with the Power Pivot, if it
4 does go out to retrieve data from a separate application or
5 database, when you execute or run the query, it then goes and
6 retrieves that data and stores it within the Power Pivot
7 itself, that is then summarized on the spreadsheet.

8 So although it pulled from a source application, the
9 results of that pull become static after the query is executed
10 and leveraged across the tool. So what was provided would
11 have had a static version of the retrievals of our production
12 system.

13 Q Well, has the -- is there a possibility that --

14 MR. HAMILTON: Objection.

15 THE COURT: I think he's saying you're asking the
16 witness to speculate by including "possibility" in your
17 question.

18 MR. VERNIA: I'm sorry, Your Honor.

19 BY MR. VERNIA:

20 Q Let me come back to that because I'm not sure how to
21 get around that issue.

22 Were these tools -- these were tools that Pilot used
23 in its audit, correct?

24 A Correct.

25 Q Were they designed for use in a criminal trial?

1 A No.

2 Q Have they been tailored for use in a criminal trial
3 in any way?

4 A The summaries have been-- The data itself, no.
5 Calculations itself, no. So all the data that's represented
6 is accurate and pulling from the same tools. As to -- the
7 only thing that we would have changed would have been the
8 actual presentation, so the summarization of the data. But
9 the actual data represented would be the same.

10 Q Do you know for a fact that the testimony you will
11 be giving today about the tools we're talking about and the
12 summaries that are derived from those is related to the very
13 same data that was provided to the defendants?

14 A I can only assume so. I didn't provide it, so...

15 MR. VERNIA: Thank you. Your Honor, if I could have
16 just a moment.

17 THE COURT: You may.

18 MR. VERNIA: Thank you.

19 (Brief pause.)

20 MR. VERNIA: Your Honor, I would pass the witness to
21 other defense counsel. Thank you.

22 THE COURT: Okay. Who is next?

23 VOIR DIRE EXAMINATION

24 BY MS. CHRISTOFF:

25 Q Good morning, Mr. Seay.

1 A Good morning.

2 Q My name is Annie Christoff. I represent
3 Mr. Wombold. You might have to bear with me for a minute as I
4 sort through information, because I don't want to retread any
5 ground that Mr. Vernia covered.

6 We talked a little bit about your background.
7 Before you began working at Pilot, you were an accountant at a
8 private accounting firm. Is that right?

9 A Correct.

10 Q And in your various jobs at Pilot, you were never
11 part of the direct sales team, right?

12 A No, I was not.

13 Q And you were -- your current position of manager of
14 the business intelligence and decision sciences team, you
15 were -- you received that promotion in January of 2012. Is
16 that right?

17 A Correct.

18 Q And you got that promotion because of your financial
19 and technological expertise, right?

20 A Correct.

21 Q And I believe that we've discussed that these Power
22 Pivot tools that you supervised the creation of, I think you
23 said they leverage database functionality within Excel, right?

24 A Correct.

25 Q So the reliability of those tools is only as good as

1 the reliability of the data going into the tools, right?

2 A That would be correct.

3 Q And I think you said as part of the audit team, that
4 you-all audited all of the customer accounts after the FBI
5 raid at Pilot, right?

6 A Correct. We-- Yes.

7 Q So that would include the customer accounts that
8 you're here to testify about today?

9 A Correct. Although I did not participate on the
10 audit, I believe, of any of the -- the accounts being
11 summarized, with my work being presented.

12 Q That work that you did on the audit, you don't do
13 that anymore, do you?

14 A I work with the data that -- same data that we used
15 during the audit, from a reporting and performance
16 perspective, but, no, I'm not auditing customer accounts in
17 that fashion.

18 Q And I believe you testified that you worked with
19 outside auditors during the audit. Is that right?

20 A Correct.

21 Q Who were those?

22 A So the outside auditors -- basically the labor
23 available within Pilot was not large enough to be able to
24 complete the work in a timely fashion that we had desired, so
25 we commissioned additional accounting firms that were

1 either -- predominantly in Knoxville and Nashville, to help us
2 with dedicated employees.

3 Q Which firms were those?

4 A I did not handle the employee side of the people
5 working there. I know LBMC was one. I couldn't -- I'm not
6 prepared to name them all here, but I could definitely find
7 out.

8 Q Can you think of any others while you're sitting
9 here today?

10 A No, I can't, so...

11 Q And you testified yesterday that at the -- the time
12 of the actual transactions that we're talking about, Pilot did
13 not have a data processing tool like the ones you supervised
14 the creation of. Is that right?

15 A Correct.

16 Q So there was no manual rebate tool at the time of
17 these transactions, right?

18 A It -- well, Price Fetch could function as something
19 similar, but from an accuracy and the different types of
20 discounts, it wouldn't apply for all.

21 Q So how were manual rebates calculated at the time?

22 A With -- with the Price Fetch system.

23 Q Can you explain that a little more, please?

24 A Sure. I mean, similar process, that they would
25 receive the data from the PRS third party, it would then apply

1 discounts that were entered into the system, to then calculate
2 the discount for a particular customer based on their fuel
3 purchases.

4 Q And when -- in supervising the creation of the Power
5 Pivot tools, what exactly does that mean, to supervise their
6 creation?

7 A So it was a tier -- or a two -- well, primarily
8 myself and Austin were the ones that were taking the lead in
9 the actual development of the tool.

10 Q I'm sorry. Yourself and who?

11 A Austin Wendell, who I mentioned earlier.

12 Q Okay.

13 A So Austin was the one with the technical expertise
14 to efficiently develop the product. I would help him in the
15 logic that needed to be applied to be able to calculate the
16 discounts correctly based on what was occurring in the normal
17 course of business. And so, along the way, as he would
18 develop the tool, I helped him in that translation, and then
19 subsequently I participated in the review of the accuracy of
20 the tool as described. In the accuracy review we also
21 included other members of the audit team as well, to help
22 participate in that.

23 Q You said these -- these tools are still being used
24 at Pilot today?

25 A Not in the same fashion, but yes.

1 Q What are they used for?

2 A So, commonly, as the -- the manual rebate tool is
3 not used much, but occasionally, but, yes, the other -- the
4 off-invoice Power Pivot tool is used regularly. So if a
5 customer was entering into our direct bill program and they
6 were supposed to have gone live on the 1st, but for some
7 reason someone didn't set them up on time, they may have gone
8 a few days without receiving a discount, you could use the
9 tool to calculate what the discount would have been for those
10 days where the customer could then be reimbursed for discounts
11 that were not due -- were not paid in the normal course of
12 business.

13 Similarly, if there ever was -- we've used it as
14 well for -- we had one example where the OPIS price for a
15 given terminal was not set up to come into our system, so we
16 had -- we were missing -- basically we were missing a cost
17 plus for a wholesale terminal, which would only have applied
18 to one customer. So in this case, once that was discovered,
19 we -- obviously that was in historical transactions, where a
20 customer was owed a discounted amount, so we would use the
21 tool to calculate what that discount would be.

22 Q And you said that the manual rebate tool is not used
23 frequently but sometimes?

24 A Sometimes it is. So the data -- the off-invoice
25 tool is obviously for off-invoice data. If the data was

1 received via PRS, the off-invoice tool was not created to pull
2 from that data source, so we could leverage the manual rebate
3 tool if we wanted to apply any discounts to a -- what we refer
4 to as a restricted customer account.

5 Q So you're using the manual rebate tool to verify
6 rebates paid in these restricted accounts?

7 A Verify is what we did during the audit. Today, if
8 there was ever a discount that we felt was -- needs to be
9 repriced or was not put in place at the time and they wanted
10 to go back historically to give a customer any amounts that
11 were due, we would use that tool as well.

12 Q So to correct a rebate, then?

13 A Correct, yes. But in the case -- one reason the
14 manual rebate tool is not used quite as much is because most
15 of our discounts, obviously, the manual rebates, we're doing
16 far fewer of those today, if any at all, so...

17 Q But they do still exist, manual rebates.

18 A I can't attest. I know -- I know last I was
19 informed, it was very few were -- remained.

20 Q Very few did exist.

21 A I'm sorry?

22 Q Very few did exist.

23 A Correct.

24 Q So we talked a little bit about PMIS and Ascend and
25 the databases associated with those --

1 A Uh-huh.

2 Q -- which is where the gallons of the historical
3 purchases are stored, right --

4 A Correct.

5 Q -- that information is stored?

6 A Yes.

7 Q And -- you may have already testified about this, I
8 apologize, but how -- how does that information get entered
9 into PMIS and then later Ascend?

10 A So I'm not sure if the jury has heard about billing
11 services yet, but billing services are similar to credit
12 cards. So our customer would come to our location, swipe
13 their billing service card, which there is an authorization
14 process, and then that data is compiled by our various billing
15 services. Those billing services then remit the transactional
16 data to us, containing the gallons, the store the product was
17 purchased at, the original rebate -- or, excuse me, the
18 original sale amount, et cetera. That data is loaded into
19 those systems.

20 Q That it is what? I'm sorry.

21 A Loaded into those systems, so...

22 Q How is it loaded?

23 A As part of that reconciliation process I mentioned
24 earlier about the accounts receivable department, once they
25 bring in the source data, it enters into a reconciliation

1 tool, which they then match up against our point-of-sale data,
2 to make sure, you know, the transactions in both systems are
3 correct, and then they would then -- the matched transactions,
4 so the ones that they reconciled, is correct, they would then
5 load into the Ascend system.

6 Q And, similarly, then, for the manual rebate
7 customers, the gallons were -- that information was located in
8 the data received from PRS that's maintained in the Price
9 Fetch database?

10 A Correct.

11 Q Is that right?

12 A Yes.

13 Q Okay. And how does -- how does Pilot receive that
14 data from PRS?

15 A It's the same billing services that are providing us
16 that data. They would send us one file for what we refer to
17 as our restricted business, which is what's loaded -- which is
18 what subsequently gets loaded into the Price Fetch system.
19 They send us the direct bill data in a separate file that we
20 load into the Ascend system. So the source is the same
21 billing services, but...

22 Q So -- make sure I understand. A digital data
23 file --

24 A Um-hmm.

25 Q -- containing this information is transmitted,

1 mailed, to Pilot?

2 A Well, it's over the Internet, obviously. It's FTP,
3 I believe, so...

4 Q Okay. FTP-sent. And then it is uploaded into the
5 system?

6 A Yes, right.

7 Q And it's -- that's coming from a third-party entity,
8 not Pilot?

9 A Correct.

10 Q And how do you know that information?

11 A Obviously I talk to the people that are involved
12 with either supporting the systems or the business partners
13 that utilize the systems, so...

14 Q Are you aware that PRS did not always historically
15 report the correct gallons information to Pilot?

16 A During what time period?

17 Q I believe the time period that you said you looked
18 at for the audit was 2005 to 2013. Is that right?

19 A Uh-huh. I know when -- I know when we have found
20 times that data was either incomplete or missing, they would
21 commonly correct the source system, so...

22 Q Okay. Sorry. Let's unpack that a little bit. So
23 PRS would send data to Pilot that was occasionally incorrect
24 or there was missing data?

25 A Potentially, yes. That reconciliation process I

1 mentioned, sometimes you would have -- I mean, they're
2 computer systems, so there may be a duplicated transaction, or
3 a file transfer failed and never made it into the -- you know,
4 we didn't receive a file for the day, so that may be
5 discovered a day or two late, so -- but when it was
6 discovered, they would contact PRS and then would get a
7 revised file that was sent in.

8 Q So, as far as you know, that all happened through
9 the reconciliation process in billing services? Is that what
10 you're saying?

11 A I know the off-invoice data was thoroughly
12 reconciled, but as for the PMI -- or, excuse me, the PRS data,
13 I know it was reviewed, but I don't know -- it's not the same
14 tool that they used for that, so -- but it was -- I know they
15 looked at it and compared it to our sales.

16 Q "They" being?

17 A It was in accounting, so...

18 Q But you don't know for sure who looked at it?

19 A No. No.

20 Q Okay. Are you aware that the direct sales employees
21 were often the ones that realized that PRS had sent incorrect
22 data or that data was missing from what PRS should have sent?

23 A I'm assuming if they were looking at reporting and
24 other data outputs, they could definitely be in a position to
25 identify that, yes, but...

1 Q But you don't know for sure?

2 A I did not have contact with the sales team much
3 during the audit, so -- but, yeah, I know today that is a
4 fact, they do that. A lot of -- if there was files that were
5 not received, that need to be loaded, yes, the sales team
6 would commonly be the ones to first notice that, yes.

7 Q But during the time period that we're talking about,
8 the transactions at issue, you don't know because you weren't
9 involved, right?

10 A Right. Well, at least with sales -- especially with
11 the sales department, we're not, so...

12 Q Do you know who Jean Matilla is?

13 A Who?

14 Q Jean Matilla?

15 A No.

16 Q Have you ever heard of direct sales employees going
17 on scavenger hunts to try and find their data?

18 MR. HAMILTON: Objection, Your Honor. We're going
19 well beyond what the basis for his opinion is, the foundation
20 for his opinion is.

21 THE COURT: Counsel?

22 MS. CHRISTOFF: Your Honor, this goes not only to the
23 witness's foundation for being able to testify about the
24 transactions at issue that he was not involved in but it also
25 goes to the admissibility of the evidence under Rules 1006 and

1 803(6).

2 These are business records, and they have not --

3 THE COURT: We're not dealing with admissibility at
4 this point, are we? We're only dealing with whether this
5 witness has the requisite background to be able to testify in a
6 manner that would be helpful to the jury and in a manner that's
7 based upon his own perception. We're not dealing with
8 admissibility at this point, are we?

9 MS. CHRISTOFF: Well, Your Honor, I believe that
10 Mr. Hamilton submitted the documents for admissibility under
11 Rule 1006 when he tendered the witness for voir dire.

12 THE COURT: Okay. And the Court has not ruled on it
13 yet, has it?

14 MS. CHRISTOFF: No, Your Honor. That's exactly why
15 I'm trying to lay the foundation that the witness cannot
16 satisfy --

17 THE COURT: Why don't we wait, then, until the Court
18 is ready to discuss that, consider that. I think I mentioned
19 to you guys weeks ago that your minds are a lot more agile than
20 my mind is and you can do several things at one time. I
21 cannot. I can only do one thing at a time. So why don't we
22 just focus on the witness's qualifications to offer the opinion
23 that the government seeks to elicit from him.

24 MS. CHRISTOFF: Thank you, Your Honor. So just so I
25 understand, you'd like me to reserve any questions that have to

1 do with the reliability of the underlying --

2 THE COURT: Admissibility. Let's separate
3 admissibility from foundation.

4 MS. CHRISTOFF: I believe that the trustworthiness of
5 the documents is an element of admissibility under Rule 803(6),
6 Your Honor.

7 THE COURT: Well, what we're talking about is his
8 opinion and whether he has-- Sometimes I bake. And if I do a
9 good job, out of the oven comes some product. But that product
10 is the combination of eggs and sugar and flour and milk and
11 some labor on my part. What we're talking about now is the
12 milk and the sugar and the flour and the pan and the oil and
13 other things that this witness has. His opinion is the final
14 product. And the final product, that's where we discuss the
15 admissibility or not. And whether his opinion is accurate or
16 not goes to that. So let's focus on the ingredients that go
17 into the cooking.

18 MS. CHRISTOFF: Yes, Your Honor.

19 BY MS. CHRISTOFF:

20 Q Mr. Seay, I believe that you testified a moment ago
21 that the information in the Lawson database was -- that you
22 were confident in the accuracy of that information because it
23 was audited by Accounts Receivable, I believe you said?

24 A No. That was the off-invoice customer purchase
25 data. In the case of the Lawson system, that's the retail

1 price information. We commonly encountered researching that
2 data as part of the work with the fuel accounting team, and,
3 as such, we came to rely on it as being good.

4 Q So -- and would you say that's true for both of
5 those databases, that you relied on it, you thought it was
6 good information?

7 A Correct.

8 Q Because there were other business units at Pilot
9 that were reviewing the accuracy of the information?

10 A Yes, and utilizing it, and would hopefully notice
11 discrepancies as well, yes.

12 Q "Would hopefully notice discrepancies." Is that
13 what you said?

14 A Yes.

15 Q But they didn't notice the fraud that occurred in
16 this case, right?

17 A Well, in that case it's not a question of the
18 accuracy of the data, because it's the accuracy of the
19 discounts that were put into the system, so it was the manual
20 entry piece. But the actual calculations and the
21 summarizations that came out of that system were accurate.

22 Q So, as far as you know, the only information that
23 was manipulated was the discount put into the system?

24 A I would-- Yes.

25 Q You testified about the OPIS price index being

1 another one of the four sources of information that go -- that
2 feed into the tools, right?

3 A Correct.

4 Q And where is the -- where does Pilot get the OPIS
5 price index information?

6 A It's similar to data transfer, data file we receive
7 from OPIS on a daily basis.

8 Q Directly from OPIS?

9 A Correct.

10 Q A data file is uploaded into the -- and which
11 database is that?

12 A Ascend system is what we used for that audit, yes.

13 Q Thank you. Ascend system. And which business unit
14 is responsible for that?

15 A IT handles the automation of that process.

16 Q The receipt of the information from OPIS and the
17 uploading of it?

18 A Correct.

19 Q And you -- I believe you testified that the
20 government asked you to utilize the Power Pivot tools to
21 perform some calculations regarding discount savings that
22 should have been paid to customers, right?

23 A I'm not-- Well, they asked me to apply specific
24 discount terms to a particular customer over a particular
25 period of time.

1 Q Thank you. So you didn't look at every customer,
2 only the ones that the government asked you to look at, right?

3 A Correct.

4 Q And you didn't choose which time periods to look at.
5 The government told you which time periods to look at, right?

6 A Correct.

7 Q And in some cases you -- the government told you to
8 look at a certain time period, and then later they came back
9 and asked you to look at a different time period, right?

10 A Well, we -- I guess when you say "look at," we --
11 our process was systematic. So, yes, we would take the date
12 range received from the U. S. Attorney's Office, and if it
13 changed -- if they asked for a different date range, we would
14 apply it, so...

15 Q Specifically, you prepared declarations and summary
16 reports using a particular date range, and then later, this
17 past fall, the government asked you -- came back and asked you
18 to run that process for a different date range, right?

19 A I believe that's correct, yeah.

20 Q And you don't know why the government asked you to
21 run that second date range?

22 A No.

23 MR. HAMILTON: Objection. Why is this-- Objection.
24 Relevance.

25 THE COURT: Counsel?

1 MS. CHRISTOFF: Your Honor, this -- these are the
2 opinions that he's about to offer. I'm just asking him about
3 the basis for those opinions.

4 THE COURT: Overruled.

5 BY MS. CHRISTOFF:

6 Q And you didn't -- the government told you which rate
7 to assume in running those calculations, right? You didn't
8 choose the discount rate to use?

9 A No. They were provided.

10 Q And, in fact, for one of the customers, the
11 government told you to use three different discount rates. Is
12 that right?

13 A Correct.

14 Q Do you know why?

15 A No.

16 Q Setting aside this work that you did based on the
17 parameters provided by the government for a second, you -- as
18 we've just discussed, you've talked about how you-all
19 performed audits on all of the customers, right, including the
20 ones that the government asked you to run in the fall?

21 A Correct.

22 Q So, you had actually performed an audit of these
23 customer accounts before the government asked you to do it,
24 right?

25 A I personally did not. I participated in the audit

1 team, and I reviewed the work of the auditors for certain
2 accounts. I reviewed my notes, and found that I did not
3 review any of the accounts that I was asked to produce
4 summaries on.

5 Q But Pilot had already performed a review and an
6 audit of those particular discounts at issue --

7 A Correct.

8 Q -- right?

9 A Yes.

10 Q So you didn't just pull the work you'd already done.
11 Instead, you reran -- and by "you," I mean your team reran the
12 calculations using the parameters provided by the government,
13 right?

14 A Correct.

15 Q Why is that?

16 A I didn't ask. I didn't...

17 Q Did you tell the government you'd already done the
18 work?

19 A I assume they were aware, but --

20 MR. HAMILTON: Objection, Your Honor. This is
21 inappropriate. This is irrelevant. There is a rule of
22 evidence that governs actually why the government might be
23 making the request in the way it made the request and not ask
24 for their particular audit results, and have our own run.
25 Asking this witness this question is irrelevant.

1 THE COURT: Counsel?

2 MS. CHRISTOFF: Your Honor, these are foundational
3 questions going to the admissibility of Mr. Seay's opinions and
4 the documents that he relied on. Of course the Court is not
5 bound, under Rule 104(a), by the rules of evidence in making
6 these admissibility determinations.

7 MR. HAMILTON: Well, Your Honor, may I respond? The
8 rule of evidence I'm talking about is the one that bars offers
9 of compromise, which the purpose of the audit was. And we were
10 not going to seek an offer of compromise that the company was
11 working out with those customers. We were going to have this
12 witness run his own or have personal knowledge for the
13 transactions at issue, so he could testify based on his
14 personal knowledge.

15 THE COURT: Objection sustained.

16 MS. CHRISTOFF: Thank you, Your Honor.

17 BY MS. CHRISTOFF:

18 Q When you were performing the audit, how did you know
19 which discount rate to apply for each customer? How did you
20 know what the deal was?

21 A So we would review source documentation that was
22 contained, commonly e-mails. We would also have network files
23 that were obtained that would contain either spreadsheets or
24 documents. We also had data from our Salesforce system, which
25 would catalog sales comments, or comments that were added by

1 the sales team maybe -- typically involving, you know, either
2 customer visits or conversations, and obviously archived
3 reporting and -- such as customer P&Ls, and other sources as
4 well. So it was pretty extensive.

5 Q Well, the archived reporting on the customer P&Ls,
6 if you are looking at an account that was -- with a rebate or
7 a discount that was fraudulently reduced, those would reflect
8 the fraudulent numbers, right?

9 A Correct. We would not necessarily use -- utilize
10 those reports for validation of a discount. That primarily
11 came out of, ideally, communications via e-mail, Salesforce
12 comments, et cetera.

13 Q So communication between a direct sales team member
14 and the customer?

15 A It could -- it could be customer to our sales team.
16 It could be a sales rep to our internal team. Salesforce
17 comments obviously would just be keyed, and would contain
18 pretty much anything. A lot of times they would contain
19 summaries of customer calls, where they could go either have a
20 conversation with -- in person or on the phone with a customer
21 and they would document their discussion.

22 Q So sometimes it wasn't in writing, right?

23 A Yes. True. I know early on there was some
24 communication with the sales team as well, with the audit
25 team. Occasionally we would actually discuss -- have

1 conversations with the customers, for their clarification on
2 their side. I think those were the exception. I don't think
3 we did-- I only participated, I think, on two of those. So
4 that was not common, but it did occur as well.

5 Q Okay. So taking those two particular examples that
6 you just gave, you're saying that in order to determine what
7 the deal was, you would have gone back to the direct sales
8 team member and asked them?

9 A I believe there were some discussions like that. I
10 only participated, I think, in a few, but...

11 Q And so those instances included instances in which
12 you determined that a customer was underpaid on an account,
13 right?

14 A Yeah. And, commonly, if we had to specifically
15 especially talk to a customer, we would have identified maybe
16 multiple discounts that could have been in play, could have
17 minor differentiations. We wouldn't just ask the customer,
18 "What was your deal?" We would normally -- or I guess we
19 probably would. We wouldn't go and say-- We would then
20 compare any -- ask customers what they thought their deal was
21 for a particular period in time. We'd then compare that to
22 the options or things we'd identified, to then determine. If
23 they agreed with one without sharing it, then we'd have
24 confidence that that was the one that was correct. Um...

25 Q Um, and I wanted to ask you about, in one of the

1 summary exhibits that has been previewed, as will be
2 introduced, there was -- correct me if I'm wrong, but it
3 appeared that there was a fifth bucket of information included
4 on it, and that was invoice e-mail addresses, I believe, on
5 the off-invoice summary. Is that right?

6 A Correct.

7 Q Where did that information come from?

8 A That came from -- initially I believe it was sourced
9 out of -- I guess the data resides -- the database is within
10 the AR Portal database, which we haven't talked about yet but
11 I'd be glad to, and it comes out of program called Data
12 Distributor that you usually utilize for distributing
13 invoices.

14 Q Do you know who pulled that information?

15 A IT.

16 Q Specifically?

17 A Nasser Hishmeh.

18 Q Are you aware that a gentleman named John Lowery
19 prepared a declaration stating that those addresses were
20 queried from the Price Fetch Oracle database?

21 A Okay. That sounds correct, yes. Yes, that sounds
22 correct. I'm --

23 Q So is that different from what you --

24 A It is.

25 Q -- just testified?

1 A Yes, it is.

2 Q So is he right, or are you right?

3 A I believe he was right.

4 Q He's right?

5 A Correct.

6 Q Okay. In regards to the testimony you just gave
7 about going back to customers and trying to flesh out what
8 they thought their deal was --

9 A Uh-huh.

10 Q -- were conversations had about whether there were
11 gallon requirements as part of the deals?

12 MR. HAMILTON: Objection, Your Honor.

13 THE COURT: The objection is that this does not go to
14 foundation?

15 MR. HAMILTON: It doesn't go to foundation, Your
16 Honor. We've gotten really far astray from the tool that was
17 overseen by this witness and talking about what he learned --
18 what -- really it's become --

19 THE COURT: We're talking about how the cake is
20 decorated instead of the quality of the eggs that went into it?

21 MS. CHRISTOFF: Your Honor, the -- I believe the
22 precise opinion that Mr. Seay is going to be asked to offer is,
23 what the discount or rebate should have been. And in his work
24 on the audit team, the way that he determined that is by -- one
25 of the ways he's determined that is by asking the customer what

1 the deal was, so that they knew what the deal should have been.

2 THE COURT: Doesn't that go to his opinion, though?

3 MS. CHRISTOFF: I'm sorry?

4 THE COURT: Doesn't that go to his opinion? I think
5 the foundational question would be, what effort was made to
6 find out. And I think that would -- that would be
7 foundational. The accuracy of the information, I think, goes
8 to the opinion, doesn't it?

9 MS. CHRISTOFF: Your Honor, I'm not asking about the
10 accuracy of the information. I'm asking how the information
11 was collected.

12 MR. HAMILTON: May I respond, Your Honor? I'd like
13 to use the baking analogy, a metaphor.

14 THE COURT: I appreciate that counsel thinks that's a
15 good analogy. Go on.

16 MR. HAMILTON: Yes, because I was trying to make sure
17 the metaphor was going to work with the decorating, but I
18 wanted the Court to consider this, because I tried to describe
19 it as a calculator, but I think baking is a good metaphor for
20 it.

21 So what Mr. Seay has described is that they have
22 gathered all the ingredients to bake a lot of cakes and they
23 have all of the ingredients together from all of these data
24 sources and it's automated, and all the ingredients are there
25 to be pulled from for each baking exercise that needs to be

1 done.

2 What she is talking about is the extra flavoring
3 that could go in for each different cake. And that flavoring
4 is going to be determined by the relationship between Pilot
5 and the customer in each instance. For example, did the
6 customer have a cost plus .05 and a 300,000-gallon
7 requirement, that's a specific ingredient for that customer;
8 it has nothing to do with the automated ingredients that are
9 already set up in the data sources.

10 So then what she's doing is, she's trying to attack
11 the audit itself and how they gathered those extra flavor
12 ingredients, rather than the basis for the set ingredients
13 that go into every cake.

14 MS. CHRISTOFF: Your Honor --

15 THE COURT: Do you want to use this name analogy, or
16 do you want to use a different one?

17 MS. CHRISTOFF: If we would like to really extend
18 this analogy, Your Honor, I believe that the government has
19 asked Mr. Seay to create metaphorical cakes, and I'm asking him
20 about the ones that he actually baked, so that we can see if
21 the hypothetical cakes are similar to the real cakes. That's
22 what I want to know about.

23 THE COURT: Well, I think by saying that, though, you
24 are conceding that you're not concerned with eggs and the flour
25 and the butter and the other ingredients. Again, we're looking

1 at the end product.

2 MS. CHRISTOFF: No, Your Honor. I am -- I'm asking
3 about those precise ingredients, I'm just asking about the
4 actual ones as opposed to the hypothetical ones, so that we can
5 compare the two and see if the hypothetical opinion that he's
6 going to offer has any value to this Court.

7 THE COURT: Well, if the witness has the requisite
8 background and the opinion would be helpful to the jury, it's
9 not required that the opinion be correct. It's up to the jury
10 to accept or reject the opinion.

11 A mechanic knows an awful lot about automobile
12 repairs. And oftentimes I receive opinions from automobile
13 mechanics on what's wrong with my car, and I give them an
14 awful lot of money, and they do the work, and the same problem
15 is there. That does not mean that the mechanic does not have
16 a good basis for his opinion. It just means his opinion was
17 wrong.

18 And what we're talking about now is whether the
19 mechanic has worked on enough cars, whether he's studied the
20 books, whether he's looked under the hood of cars. That's
21 what we're talking about. We're not talking about the
22 ultimate opinion and whether the opinion might be correct or
23 incorrect. That's later on. What we're dealing with now is
24 the eggs, the butter, the other ingredients. So the objection
25 is sustained.

1 MS. CHRISTOFF: Thank you, Your Honor.

2 THE COURT: And just for appeal, sometimes the courts
3 of appeal are very literal, and I would like them to know that
4 we actually don't have any butter, we don't have any flour in
5 the courtroom; this is merely an analogy for the lawyers to use
6 in making their arguments.

7 MS. CHRISTOFF: I'm just making sure I've asked all
8 my questions, Your Honor. If I could have a minute.

9 (Brief pause.)

10 MS. CHRISTOFF: Pass the witness.

11 THE COURT: Okay. Why don't we take our morning
12 break now. It's about 20 minutes until the hour. Let's return
13 at 11:00, 11:00.

14 (Brief recess.)

15 THE COURT: You may proceed.

16 VOIR DIRE EXAMINATION

17 BY MS. BREVORKA:

18 Q Good morning, Mr. Seay. My name is Jenny Brevorka,
19 and I represent Mark Hazelwood.

20 A Good morning.

21 Q Good morning. I wanted to start with a few
22 questions that Mr. Vernia touched upon by asking you about the
23 databases from which you pulled data to help build your manual
24 rebate tool.

25 A (Moving head up and down.)

1 Q You testified earlier that the databases from which
2 you pulled information were snapshots or copies of production
3 or what you called live versions of these databases, correct?

4 A Correct.

5 Q Are you aware that OPIS issues corrections to OPIS
6 pricing that was previously distributed?

7 A Yes.

8 Q How, if at all, did your subsequent tool that
9 captured or copied point-in-time data correct for any OPIS
10 corrections to pricing that were distributed?

11 A During the normal course of business, the IT
12 department, if there are any data corrections that were
13 required, they're responsible for correcting those in the
14 source application data systems.

15 Since the query -- you know, the queries we used
16 obviously would have captured any changes that were made
17 prior, there potentially could have been a subsequent change
18 made after the data was captured, if there were no correction
19 after that. I'm not aware if there was or not, though.

20 Q So let me make sure I understand this correctly. So
21 the tools you worked off of, there could have been corrections
22 made by OPIS to the pricing, but because that took a snapshot
23 at a certain point in time, they would not have incorporated
24 that correction to OPIS pricing?

25 A Yes. Normally those corrections are made as soon as

1 they're known. So it would be doubtful if there would have
2 been -- since that copy was taken far enough subsequent to
3 April of 2013, that it should have been accounted for. But
4 there's also a possibility that there was one much more prior,
5 which would have been nontraditional or nonstandard.

6 Q So you said it would have been doubtful, but you
7 can't be certain, correct?

8 A I cannot, no.

9 Q Okay. I'd like to turn to something you talked a
10 little bit about yesterday with Mr. Hamilton and Mr. Vernia,
11 the purpose and genesis of the audit from which you later
12 built your manual rebate tool.

13 A Um-hmm.

14 Q Do you recall testifying that -- in response to
15 Mr. Hamilton's question, that "Initially after the raid we
16 tried to understand the breadth of the alleged fraud that
17 occurred, we then tried to determine what was owed to any
18 customer, and then, of course, we tried to get them paid back
19 as soon as possible"?

20 A (Moving head up and down.) Yeah.

21 Q Do you recall testifying that?

22 A I do, yes.

23 Q Okay. Can we talk a little bit as far as the last
24 part of that, we tried to get them paid back as possible.

25 A Um-hmm.

1 Q Do you recall -- so Pilot paid -- as -- in the
2 course of this audit, repaid any customer that Pilot believed
3 lost money due to fraud, correct?

4 A That's my understanding, yes.

5 Q And, in total, Pilot paid more than 56 million back
6 to customers they thought lost money due to fraud, correct?

7 A I believe that's correct, yes.

8 Q Pilot also went so far as to pay customers who may
9 have lost money due to innocent mistakes, correct? A clerical
10 error, or just a mistake?

11 A Yes.

12 Q So even in instances where fraud was not
13 conclusively found, Pilot said, "We're still going to pay this
14 customer, because we think they should have received more,"
15 right?

16 A Can you -- can you restate that question?

17 Q Sure. So there were cases or certain customers
18 where sometimes the audit team may have found a mistake but
19 they couldn't determine whether it was fraudulent or benign,
20 correct?

21 A Yes.

22 Q And in those instances, Pilot said, "We will still
23 pay the customer the money -- the money they should have been
24 paid originally," correct?

25 A There was a reasonableness judgment, but, yes, that

1 was -- commonly if it was a borderline scenario, we would err
2 in the customer's favor, so...

3 Q Let's go back. You mentioned "borderline scenario."
4 Can we go back for a second? Were there ever borderline
5 scenarios as to what was owed to a customer in instances where
6 the Pilot audit team thought fraud had occurred?

7 MR. HAMILTON: Objection, Your Honor. We've moved
8 beyond-- We're talking about the audit, and not about his
9 opinion. A number of questions have been asked about the
10 audit, 56 million in fraud determined, some -- maybe more in
11 addition to that that wasn't fraud. But what's the purpose of
12 it? It's irrelevant. What's relevant about this as it relates
13 to his opinion?

14 MS. BREVORKA: If I may, Your Honor?

15 THE COURT: You may.

16 MS. BREVORKA: One of the bases the defense seeks to
17 attack, the manual rebate tool that Mr. Seay is offering --
18 going to offer summary opinions through, is that we believe it
19 was created in anticipation for litigation. We believe the
20 scope of Pilot's --

21 THE COURT: Let's assume that you're correct, that it
22 was anticipated -- it was created in anticipation of
23 litigation. Does that affect this witness's opinion?

24 MS. BREVORKA: I think it does, Your Honor. We
25 believe --

1 THE COURT: Does it affect this witness's opinion, or
2 does it affect this Court's decision on admitting it or not?
3 Those are two different questions.

4 MS. BREVORKA: Yes, Your Honor. I think ultimately
5 it would go to the Court's decision about admitting it. And I
6 think I'd like to lay the foundation that -- that this tool
7 that --

8 THE COURT: Well, let's do that, then, outside of the
9 witness, then. Let's focus on the witness's qualifications.
10 Let's see if he used the right eggs; let's see if he got
11 quality butter, if he got the appropriate type of wheat, if he
12 mixed the batter properly and he kept it in the oven the right
13 length of time.

14 BY MS. BREVORKA:

15 Q Turning to your culinary skills now, Mr. Seay, if I
16 may. Prior to your work in the audit, did you ever work
17 directly with the direct sales department?

18 A Not -- not in the regular course of business, no,
19 so...

20 Q Okay. And so also as -- just to be clear, in your
21 position as the manager of business intelligence, did you ever
22 create computer programs or help the direct sales department
23 reach specified goals?

24 A We've done extensive work subsequent to April 2013
25 with the sales team, yes.

1 Q All right. Good point. And let me clarify. Prior
2 to April 15th, 2013, had you -- as the manager of the business
3 intelligence department, had you any direct exposure to direct
4 sales or their computer programs that they specifically use?

5 A There would be some. Obviously my work within the
6 field accounting department, we were estimating discounts
7 throughout the month, producing accurate fuel margins. So,
8 again, that was more accounting focused, but we did have some
9 familiarity there. Obviously we were familiar with the
10 systems that were generating the accounting. Um...

11 Q You said there-- And I'm sorry to speak over you.
12 You said there were some. Please elaborate. What do you mean
13 by that?

14 A So part of business intelligence, we try to create
15 reporting and insights from a data perspective on -- for our
16 business partners. There was-- We did some work within the
17 loyalty space, which I mentioned prior.

18 So in this case we had cents-per-gallon loyalty
19 discounts for our customers, which were more driver-centric.
20 That was a benefit that the driver received, not the fuel
21 customer. However, a customer could negotiate to have
22 additional loyalty discounts applied to their drivers. As
23 such, we did do some work with the sales team on that. That
24 didn't -- that was not cost plus/retail minus
25 discount-related, but it was customer-centric.

1 Q Okay. So prior to April 15th, 2013, your personal
2 interactions with the direct sales team about manual rebates
3 or deals with customers, can you explain those to the jury?
4 What, if any, did you have?

5 A There were not many, other than just the accounting
6 side of being familiar with how the systems accounted for
7 data. When we got report-- I'm assuming there was some
8 involvement with the sales team on defining the scope of the
9 requirements, but not from a customer specifics perspective,
10 no.

11 Q I'm sorry. Could-- You spoke a little fast. I
12 apologize.

13 A I'm sorry. I'll slow down.

14 Q Yeah. If you could go back. So you say, "not
15 many." Could you expand on that?

16 A Yeah. I think most of our work with my current
17 role, prior to April 2013, was weighted more towards our
18 loyalty aspects of our business, which did involve some
19 customer data, but it was not commonly related to either
20 manual rebates or the -- the off-invoice discounts.

21 Q And, in fact, the loyalty program is not actually
22 part of the direct sales department, correct?

23 A No, it is. So -- well, the loyalty is -- in a
24 sense, is managed by a separate team. The sales department
25 has the latitude to leverage loyalty to provide a loyalty

1 incentive for their drivers. Again, it's -- in this case,
2 I'll do the scenario. So our loyalty program is similar to --
3 we have a loyalty card similar to what you would have, you
4 know, with Kroger's or other retailers. At the time of a fuel
5 transaction, you can swipe your loyalty card. And the
6 standard discount for our diesel customers is one cent per
7 gallon. So for every gallon of fuel you purchase, you get one
8 cent loaded onto your loyalty card, which then can be utilized
9 to redeem against purchases inside our stores, so
10 non-fuel-related purchases, so on Snickers bars, or food, et
11 cetera.

12 The sales team has a discount mechanism that they
13 can apply called special points, where they can give -- they
14 call it a point multiplier to a loyalty program for their
15 drivers. So in that case, that is customer-specific, but,
16 again, it's not a manual rebate discount, it's not an
17 off-invoice discount, it's a discount that would be received
18 as loyalty points loaded on their drivers' loyalty accounts.
19 So we did do some work on that prior to April 2013.

20 Q Okay. And your personal exposure, as far as it went
21 to -- your personal exposure to direct sales personnel, as far
22 as it went to manual rebate deals or customer-specific diesel
23 deals, you had no exposure in that sense prior to April 15th,
24 2013, correct?

25 A Again, only surrounding the accounting of discounts,

1 which may have involved the direct sales team from a
2 conversation perspective, typically the sales analyst team,
3 but not for customer-level off-invoice or manual rebate
4 discounts, so...

5 Q Okay. And you mentioned you may have had some
6 conversations. Do you recall how many?

7 A No, I don't. I mean...

8 Q Less than five?

9 A It was probably more than five, but...

10 Q Probably more? Less than ten?

11 A I can't recall. I mean --

12 Q Okay.

13 A -- it's hard to differentiate, especially the work
14 that was not related to customer discounts. This is a role
15 I've had for six years. What occurred before and after that
16 date is -- I can't recall, from the -- from the loyalty
17 aspects and things I've talked about.

18 Q But your primary knowledge of manual rebates and
19 those type of deals came from your work on the audit team
20 after April 15th, 2013, correct?

21 A Primarily, yes. Again, I was knowledgeable about
22 the accounting prior, and what went into the accounting for
23 our customer discounts, but diving into the actual source
24 systems or the granularity that was required was predominantly
25 done during the audit period, yes.

1 Q Okay. So in your role as the supervisor of the
2 audit team, I'm curious, what specifically did you do to
3 review the work of those that were underneath you?

4 A So it was not a reporting structure. It was a team
5 that was put together to -- at least my title did not
6 represent some type of managerial or supervisory duties.
7 Another person on the audit was coordinating the people
8 aspects of the audit.

9 So my role, from a review perspective, was on the
10 work product of the audit team. So the auditors were
11 responsible -- they'd be assigned accounts. The audit team
12 would then review any evidence they would have to help
13 determine an opinion about if any payments were due and, if
14 so, what discounts should have been in place. They would
15 meticulously document their findings, source any evidence that
16 they had to support their conclusion.

17 So we typically had a threshold that was applied,
18 from a dollars perspective, that would necessitate a
19 senior-level review. So the audit team could always bring us
20 in for an opinion, so if they're working on a case, no matter
21 the monetary outcome, we would be able to then help them with
22 their process, or if there was anything over a certain amount
23 threshold, then we would be required to have senior manager
24 approval on any recommendation.

25 Q In reviewing the work product, do you mean that you

1 ultimately reviewed the conclusion that was made by another
2 person as to what sort of money Pilot should pay a customer?

3 A What discount applied, which would then, of course,
4 translate into any monetary amounts due, yes.

5 Q Okay. What human beings, if any at all, did you
6 speak with about the audits that were being conducted? As far
7 as when you reviewed a work product, what human beings were
8 you speaking with about the underlying knowledge -- underlying
9 documents?

10 A Obviously the audit team themselves, if there was --
11 you know, we had access to accounting and IT groups as well,
12 from some of the information, if it was data-related. We did
13 have access -- there were some employees on the sales team
14 that would participate in conversations, and occasionally
15 there would be a -- a customer would be contacted as well.

16 Q Let's go -- you mentioned two sources outside of the
17 audit and accounting teams--employees in the sales department,
18 and occasionally a customer?

19 A Um-hmm.

20 Q Which employees in the sales department did you or
21 your team speak with?

22 A I joined the audit team probably two, three weeks
23 into the audit. So within the initial period, there were some
24 salespeople that were participating in conversations. By the
25 time I joined the audit, there were very few. So I did not

1 have much personal interaction with the sales team.

2 Q And so did any of your knowledge of specific deals
3 come from conversations with those in the direct sales
4 department?

5 A Not commonly, no.

6 Q So, no, none of your -- none of your knowledge about
7 specific deals came from speaking with the salespeople or
8 their managers themselves, correct?

9 A I believe that's the case. I know I had the
10 opportunity to interview Brian Mosher. That was the one
11 scenario for me. We did ask him account-level-specific
12 questions, but most of the questions he did not respond to.
13 So I do not believe he influenced the outcome of any of those
14 audits. But there was a conversation that did occur, so...

15 Q Okay. And you also mentioned talking to a few
16 customers. What customers did you speak with?

17 A I remember speaking with Halvor, I believe -- not
18 Halvor -- I can't recall. There was only -- that's only one
19 conversation I remember, and I can't recall, so...

20 Q So you had, at most, one conversation with one
21 customer about the manual rebate --

22 A It was the off- -- it was the off-invoice tool in
23 this case. I know it was a direct bill -- large-volume direct
24 bill customer, is the one I spoke with, not manual rebate.

25 Q So help me break that down a bit.

1 A Um-hmm.

2 Q So you spoke with one customer who was not a direct
3 bill customer --

4 A No, who was a direct bill customer.

5 Q -- oh, who was a direct bill customer, about their
6 contract, their diesel sale contract?

7 A Correct.

8 Q Okay. What about the audit teams that you
9 supervised, are you aware of how many conversations they had
10 with customers?

11 A I'm not. I --

12 MR. HAMILTON: Objection. Objection to relevance,
13 again, Your Honor. Again, we have now moved into the category,
14 as I tried to identify, of the flavorings that went into the
15 cake and the conversation --

16 THE COURT: No. I think --

17 MS. BREVORKA: Your Honor --

18 THE COURT: I think we are more talking about whether
19 the milk came from contented cows or discontented cows.

20 MR. HAMILTON: Well...

21 MS. BREVORKA: Your Honor, may I respond?

22 THE COURT: You may.

23 MS. BREVORKA: Thank you. One, I object to
24 Mr. Hamilton's continued use of speaking objections. Second,
25 the relevance is direct. Mr. Seay's knowledge, as far as

1 manual rebates, comes largely from secondary sources, and the
2 teams he supervised, largely secondary sources. What I'm
3 trying to ascertain and help the jury understand is his
4 personal knowledge, his one-on-one conversations, or the teams
5 that he supervised, that he later gathered information from to
6 build this tool the prosecution wants to use, whether they had
7 specific personal interactions, primary source material, into
8 crafting this audit, which later evolved into helping build
9 this tool.

10 THE COURT: Is that a requirement for a lay person to
11 give an opinion?

12 MS. BREVORKA: It's not, but I think it goes to the
13 foundation of his personal knowledge, as opposed to his
14 secondary-hand knowledge.

15 THE COURT: There was a movie, I've forgotten the
16 name of it, but there was a scene that people found quite
17 comical involving a young woman. It was a trial in
18 Mississippi. And the issue was whether an automobile was an
19 automobile that was described. And this young woman was put on
20 the stand, and she did not appear to be someone who knew much
21 about automobiles, and then she gave an elaborate and very
22 impressive description about -- I think it was tires on a
23 particular type of automobile for a particular year. I doubt
24 that this young woman ever spent much time in a automobile tire
25 manufacturing plant. So it's unlikely she had much personal

1 knowledge of this. But the knowledge that the rule requires,
2 does it absolutely require the person have firsthand personal
3 knowledge of all of the aspects of what they're talking about?

4 MS. BREVORKA: It does not, Your Honor, but the
5 defense seeks to elicit through Mr. Seay a better understanding
6 of his -- the knowledge actually gained through his work
7 experience—he's being put on under 701 as a lay witness—so
8 the basis for his opinions, whether they're largely based on
9 secondhand knowledge or personal firsthand knowledge.

10 THE COURT: And I think he's described his personal
11 involvement in the construction of some of these tools, his
12 overseeing of people that worked. To some extent, that's
13 personal knowledge, isn't it?

14 MS. BREVORKA: It is, Your Honor.

15 THE COURT: Okay. Well, I'll do this. I'll let you
16 explore this some. But let's not belabor it. I think personal
17 knowledge is a requirement, but I don't think that the cook has
18 to go out to every farm and see how the chickens are being
19 tended, see how the cows are being done, to see how the wheat
20 is being reaped and prepared for flour.

21 MS. BREVORKA: I appreciate the Court's baking
22 analogies, as a baker myself. But, indeed, as a fellow baker,
23 you can attest that one's foundation is only as good as perhaps
24 the training or the skills they bring to when they mix the
25 ingredients. And that's what I think I seek to ask. I really

1 only have one or two questions left, and I appreciate the
2 Court's indulgence on this.

3 THE COURT: Well, we don't we stay in the kitchen,
4 then.

5 MS. BREVORKA: Yeah, let's do that.

6 THE COURT: Let's stay in the kitchen and not venture
7 out into the farm.

8 MS. BREVORKA: Sure.

9 BY MS. BREVORKA:

10 Q Do you have any knowledge about the number of
11 customers that those that you supervised actually spoke with
12 in the audit team?

13 A Again, I did not supervise any auditors doing the
14 work from a managerial or supervisory perspective. It was
15 accountants that I reviewed their work product. And -- but I
16 could not recall any -- the number of conversations they may
17 or may not have had with the customer directly.

18 Q So you -- just for clarification, you do not recall,
19 as in you don't think any conversations occurred, or you just
20 can't remember how many may have occurred, if any at all?

21 A I cannot remember any at all.

22 MS. BREVORKA: Okay. Your Honor, if I may have a
23 moment.

24 (Off-the-record discussion between defense counsel.)

25 BY MS. BREVORKA:

1 Q Just a few more questions, Mr. Seay. In reviewing
2 the work product of the audit team, did you personally review
3 work product that contained evidence of customer -- deals with
4 customers?

5 A Yes.

6 Q And if you had to -- approximately, how many of
7 those deals did you review?

8 A I mean, it was hundreds, but I'm not sure the total
9 number.

10 Q Of those hundreds of deals, an estimate, what
11 percentage of those deals were in writing, as opposed to oral
12 deals with customers?

13 MR. HAMILTON: Objection to relevance.

14 THE COURT: Counsel?

15 MS. BREVORKA: I think it goes to his understanding
16 of the manual rebates and the workings of the direct sales
17 team, which ultimately the prosecution seeks to lay as the
18 basis for his personal knowledge, which then led to the
19 building of this tool.

20 THE COURT: Overruled.

21 A So most of the evidence that I remember for these
22 accounts was files and -- that were obtained for usage. They
23 did involve e-mail communications from the customers. So we
24 may not -- there were -- it was not common to call a customer
25 to get -- to receive their input; however, we would utilize

1 the e-mails that was their correspondence, typically with our
2 sales team, to help support any opinions being made.

3 Q So -- but those after-the-fact e-mails, they didn't
4 specify, this deal was oral, or this deal was written,
5 correct?

6 A They could.

7 Q But did they?

8 A So when you say "oral," like, from a sales team
9 conversation?

10 Q Sure.

11 A Well, all of them were in a conversation, typically,
12 but then they would substantiate their conversation in an
13 e-mail, was common.

14 Q Good point. And the distinction I'm trying to draw
15 to help understand the basis of your knowledge is, the work
16 product you reviewed, could you provide an estimate of how
17 many deals appeared to be an oral handshake, "Let's do this
18 deal," versus, "Mr. Jones, here is your contract. Please
19 review it and let me know if there are any errors"?

20 A I couldn't give an exact percentage now. Even the
21 ones that were verbal contracts, there were subsequent either
22 comments within the Salesforce system or the sales reps were
23 logging in their notes of their conversations. There were
24 also substantial e-mails as well, communicating with the
25 inside sales team as well, on either the conversation or

1 instruction on any discounts to apply, so...

2 Q Let me go back to something you just said. Even --
3 you mentioned, even in instances where there were -- appeared
4 to be oral deals, there was after-the-fact documentation. So
5 let's reverse this and see --

6 A Um-hmm.

7 Q -- if you can provide an estimate for the jury. How
8 many of the audits that you reviewed, in the hundreds --

9 A Um-hmm.

10 Q -- appeared to have written contracts that commenced
11 the deal, as opposed to what you've described as frequently
12 seeing after-the-fact documentation of an oral conversation?

13 A Can you define "written contract"?

14 Q Sure. A letter, or an e-mail to this customer
15 saying, "Your deal is X."

16 A I couldn't give a percent. I mean, there -- it was
17 definitely -- I would definitely say it was common. We would
18 encounter it commonly, but from a percentage perspective...

19 Q And was it common to see deals that didn't appear to
20 have this either letter or e-mail specifically saying, "Your
21 deal was X"?

22 A Yes.

23 MS. BREVORKA: Okay. Thank you very much.

24 MS. CHRISTOFF: Your Honor, at this time I'd like to
25 renew the defendants' objection to this witness's opinions

1 under Rule 701 for the following reasons: As the Court knows,
2 a foundational requirement under Rule 701 is that the testi- --
3 the opinions not be based on scientific, technical, or other
4 specialized knowledge that are within the scope of expert
5 testimony. This witness has provided a mountain of information
6 and evidence about how technical and specialized his -- the
7 basis of his opinions are.

8 He described his work as involving complex
9 calculations, which he said were obviously complex
10 calculations. He said his job requires expertise and
11 technical skills in computer science and math. He's taken
12 classes to learn how to use the tools that he helped supervise
13 the development of. And he said that it's a specialized tool
14 that a typical user would not understand. So this is the kind
15 of testimony that's not at all the type of everyday life
16 experience that's properly subject to Rule 701.

17 In addition, the witness has made clear that he does
18 not have particularized knowledge gained from his daily work
19 at Pilot, he was not at all familiar with the employees or the
20 work at issue at the time. He's confirmed that he doesn't
21 have any knowledge of how these -- the data was used at the
22 time of the transactions at issue, his only understanding of
23 this information came after the FBI raid at Pilot. So he
24 lacks that -- that particularized knowledge.

25 And then, of course, Your Honor, the first

1 requirement under Rule 701 is that the opinions are based --
2 rationally based on the witness's own perceptions. And
3 Mr. Seay has made clear that he was not involved in these
4 transactions at the time of the facts of the alleged
5 conspiracy. He has no firsthand knowledge. The only
6 knowledge he gained was after the fact, after the FBI raid, in
7 anticipation of litigation. And he has no rational basis for
8 his opinions. A lot of the information that he would purport
9 to offer was pulled from -- from people that he worked with or
10 worked above, that he did not verify, and were not done under
11 his direction.

12 So, Your Honor, this witness is not properly--
13 There's no proper foundation for admitting this witness's
14 opinions under Rule 701.

15 THE COURT: Thank you. That was a very tight
16 argument.

17 Mr. Vernia?

18 MR. VERNIA: Your Honor, I'm --

19 THE COURT: I take it, you'd like to adopt everything
20 she said. Is that correct?

21 MR. VERNIA: Absolutely. And particularly the way
22 that she said it, Your Honor.

23 I rise only to point out -- to make one point, Your
24 Honor, and that is, in Your Honor's order back in October, you
25 specifically distinguished *United States vs. Ganier*,

1 G-A-N-I-E-R, on the grounds that in that case the witness in
2 question had -- was working for the government as a
3 government -- as an IRS forensic -- computer forensic agent.
4 And I would simply ask that in light of the testimony that
5 Mr. Seay has offered today, which -- and yesterday, which has
6 demonstrated that he in fact did not work on these issues
7 prior to the time of the search, I would respectfully submit,
8 sir, that this case is governed by *United States vs. Ganier* as
9 well as *United States vs. White*.

10 And if I could read a brief portion of *United States*
11 *vs. White's* description of *Ganier*. The court said, "There the
12 government argued that the computer specialist would offer,
13 quote, 'lay testimony available by running commercially
14 available software, obtaining results, and reciting them.'"
15 And that was *Ganier* at 925.

16 And the *White* court continued, "We rejected this
17 claim, finding that, quote 'such an interpretation would
18 require the witness to apply knowledge and familiarity with
19 computers and the particular forensic software well beyond
20 that of the average lay person.'"

21 I submit, Your Honor, that the evidence today
22 establishes that this case falls clearly within *Ganier*. I
23 would also point out, Your Honor, that the alternative that
24 was considered in *Ganier*, which was admission of the testimony
25 under Rule 702, is not available in this case because the

1 government specifically has withdrawn its option of offering
2 Mr. Seay's testimony as an expert witness. Thank you, Your
3 Honor.

4 MS. BREVORKA: Just one point, Your Honor, I'd like
5 to add to what Ms. Christoff said. We believe that Mr. Seay
6 should be precluded from testifying about the manual rebate
7 tool, because we believe that it was developed in anticipation
8 of litigation. The scope of this audit that eventually led to
9 the creation of this tool that the prosecution wants to use in
10 these summary exhibits was unparalleled in Pilot's history.
11 Pilot -- Mr. Haslam held a press conference about the audit a
12 week after the raid. The company went so far as to pay
13 interest on the audit. The company went so far as to make sure
14 trucking companies personally knew about the audit, sending
15 direct sales personnel on the road to talk to them about the
16 audit.

17 We believe these are all indicia and signs that this
18 audit was done in anticipation of litigation, and that the
19 tools as a result of it were also done in anticipation of
20 litigation, and that therefore the product should not be
21 allowed to be used in lay witness testimony.

22 THE COURT: Thank you.

23 MR. COOPER: Your Honor, to the extent you need to
24 hear from Ms. Mann, we would join what's been said by our
25 colleagues.

1 THE COURT: Thank you. Let me have Ms. Christoff
2 stand.

3 Ms. Christoff, as I said, I was very impressed with
4 your tight argument.

5 MS. CHRISTOFF: Thank you, Your Honor.

6 THE COURT: Let me see if I can explore some of the
7 issues that you raised. One of the issues was that this
8 witness has testified to an awful lot of specialized knowledge.
9 I take it in your experience you probably concede that doctors
10 have specialized knowledge?

11 MS. CHRISTOFF: Yes, Your Honor.

12 THE COURT: A typical medical doctor goes to
13 college -- goes to -- graduates from high school, goes to
14 college for four years, goes to medical school for four to
15 seven years, depending upon the specialty. Is that right?

16 MS. CHRISTOFF: Yes, Your Honor.

17 THE COURT: And they have to undergo yearly
18 professional education to keep -- to keep current. Is that
19 right?

20 MS. CHRISTOFF: Yes. Yes.

21 THE COURT: There is a case called *Williams vs. Mast*
22 *Biosurgery USA*, found at 644 F.3d 1320 -- 1312, a 2011
23 Eleventh Circuit case. And a treating physician -- and since
24 he's a physician, I'm assuming this is someone who has gone to
25 school all that time that we talked about, who keeps up with

1 the profession, and he was allowed to testify about a patient's
2 problems as a lay witness. And the court said so long as he
3 was not basing his testimony upon a hypothesis, but, rather,
4 relating just what he observed and what he saw and what he
5 concluded and what his opinions were, he was actually a lay
6 person and not -- not an expert.

7 It would appear to me that there's not too much
8 difference from that, this physician who was accepted as a lay
9 expert there, who was using a foundation of knowledge that the
10 typical person would not possess, but he was -- he was limited
11 to talking about the observations he had of the patient, the
12 decisions he made about the patient, his opinions about the
13 patient, and whatnot. Wouldn't that somewhat suggest, then,
14 that someone who does have some knowledge of accounting and
15 computers and a lot of other knowledge and information that
16 the typical person does not have can still be a lay witness?

17 MS. CHRISTOFF: Your Honor, I believe the case that
18 you cited was an Eleventh Circuit case. In the Sixth Circuit,
19 there is a well-established line of cases that say that
20 treating physicians may not testify as lay witnesses if their
21 knowledge was gained in anticipation of litigation. So, for
22 example, Your Honor, *Fielding vs.* --

23 THE COURT: Well, now, you've added something to it,
24 that last part there, "if -- if in anticipation of litigation."
25 My assumption is that in the Eleventh Circuit, this doctor was

1 just a regular doctor who had a regular business, and this
2 patient comes in, he treats the patient, then later on, for
3 some reason, he's called to testify.

4 MS. CHRISTOFF: Yes, Your Honor. And so in this case
5 I would believe that the analogy here would be Mr. Seay's work
6 before he --

7 THE COURT: Well, let's take up -- so you would not
8 have any disagreement, then, that the Eleventh Circuit was
9 correct in treating this physician with specialized knowledge
10 as a lay witness?

11 MS. CHRISTOFF: Your Honor, if I could just clarify.
12 To quote Sixth Circuit case law, it says that the --

13 THE COURT: Ms. Christoff, I think you're avoiding
14 the question now.

15 MS. CHRISTOFF: I'm just clarifying the exact
16 applicable law, Your Honor. The Sixth Circuit has held that a
17 treating physician may testify as a lay witness --

18 THE COURT: So our circuit, the circuit that governs
19 us, agrees with the Eleventh Circuit that a person with an
20 awful lot of medical knowledge, who's gone to school, who's
21 gotten credentials, who's been licensed, can still be a lay
22 witness?

23 MS. CHRISTOFF: Only on testimony learned through the
24 actual treatment and from the records reviewed during that
25 treatment.

1 THE COURT: So the fact that there is specialized
2 knowledge involved does not disqualify the person.

3 MS. CHRISTOFF: Not in and of itself, Your Honor.

4 THE COURT: Okay. There is another case, and I'm
5 quite sure you're familiar with this, since you were familiar
6 with *Williams*. And I commend you on that. I really like it
7 when I cite a case at random and counsel knows about the case
8 and can talk about the case.

9 This other case I'm pulling at random is *Ryan*
10 *Development Company vs. Indiana Lumbermens Mutual Insurance*
11 *Company*. That's a Tenth Circuit case. And there there was an
12 accountant who was accepted as a lay witness. And this
13 accountant had prepared the insured's claim of loss for
14 submission to the insurance company. Now, I don't know
15 because I haven't examined the case in detail, but I'm
16 assuming that since this accountant prepared the insured's
17 claim of loss, the loss had already happened. So we have
18 someone coming in after the fact, and this person takes
19 information that's there and they prepare something using
20 their accounting skills and knowledge and experience to
21 prepare a claim. There would be specialized knowledge there,
22 also, wouldn't there? An accountant?

23 MS. CHRISTOFF: Yes, Your Honor. And I have to
24 confess, I'm not familiar with that case. However, there is
25 significant contrary authority that I could cite on that point,

1 particularly in the insurance context. For example, the
2 *Sinkovich* case, which we've cited in our brief, involved a boat
3 accident and a marine inspector who went to inspect the site of
4 the accident and gained his knowledge of the underlying facts
5 that way. And he was not permitted to testify as a lay
6 witness.

7 THE COURT: A marine inspector. So he -- what he's
8 doing is preparing a report on something; whereas, the
9 accountant was preparing the claim for action by the insurance
10 company, he was acting on behalf of the client, of the loss, of
11 the insured.

12 MS. CHRISTOFF: Well, Your Honor, there are also
13 cases that involve accountants that are brought in after the
14 fact. For example, the *JGR* case, which I believe is a Sixth
15 Circuit case -- yes, it is, Your Honor, a Sixth Circuit case
16 from 2004, in which an accountant was brought in to review a
17 company's books, but because that accountant lacked firsthand
18 knowledge of the underlying facts, he was not permitted to
19 testify as a lay witness under Rule 701, Your Honor, and he was
20 an expert witness under 702.

21 THE COURT: And I think one of your colleagues
22 brought up the prohibition against accepting opinion testimony
23 if it was only prepared in preparation for litigation. Is that
24 in Rule 702 only, or is that in Rule 701, also?

25 MS. CHRISTOFF: Well, I believe under Rule 702

1 typically an expert would have gained their knowledge during
2 litigation, Your Honor. So I don't think --

3 THE COURT: Or in anticipation of litigation.

4 MS. CHRISTOFF: In-- Exactly. I believe that rule
5 would only apply to Rule 701, which is the rule we're operating
6 under here.

7 THE COURT: So that would distinguish the young woman
8 in the movie who talked about the automobile tires --

9 MS. CHRISTOFF: Your Honor --

10 THE COURT: -- she acquired that knowledge not in
11 anticipation of litigation.

12 MS. CHRISTOFF: I apologize, Your Honor, for
13 interrupting you. I believe the name of the movie is *My Cousin*
14 *Vinny*. It's one of my favorites. And Marisa Tomei played that
15 character, Your Honor, and she was qualified as an expert.

16 THE COURT: Oh, she was qualified as an expert?

17 MS. CHRISTOFF: Yes, she was, Your Honor. Yes, she
18 was.

19 (Laughter.)

20 MS. CHRISTOFF: I am so glad I got the opportunity to
21 make the record clear on that point.

22 THE COURT: I think that was a Mississippi state
23 court judge. So they probably did it wrong, didn't they?

24 (Laughter.)

25 MS. CHRISTOFF: It was Alabama, Your Honor. It was

1 an Alabama state court judge.

2 THE COURT: I'm sorry, an Alabama state court judge.

3 MS. CHRISTOFF: And the defense attorney was
4 permitted to voir dire the witness, in which he established her
5 expert qualifications.

6 THE COURT: It's amazing how much you can learn in
7 these trials. Anything further?

8 MS. CHRISTOFF: No, Your Honor.

9 THE COURT: Okay. Let me hear from the government,
10 then.

11 MR. HAMILTON: Yes, Your Honor. So what controls the
12 decision here, Your Honor, is actually the advisory committee
13 notes to Rule 701, which specifically excerpts out this kind of
14 testimony.

15 The Court will recall that yesterday Mr. Seay
16 testified that all of his testimony is going to be based
17 upon -- exclusively based upon particularized knowledge that
18 he gained from his employment at Pilot. That takes us out of
19 702, and it is part of the carve-out for 701, which means that
20 even if it's of a technical nature, if he gained it strictly
21 from his particularized knowledge that he gained from his
22 employment, then it's admissible under 701.

23 And really the controlling authority for this
24 *United States vs. Kerley*. In that case there were two, two,
25 underwriting -- underwriting employees, one from Citizen's

1 Bank and another one from SunTrust Bank. Citizen's Bank, her
2 name was Barb DeMichele. And SunTrust Bank, her name was Ro
3 Owens. They came in, and the government in that case asked
4 them to provide an opinion about whether or not -- if SunTrust
5 and Citizens Bank had been aware of misrepresentations at the
6 closing table, whether or not they would have closed those
7 loans. Two key points: It was after the fact. Those
8 underwriting witnesses had not reviewed the loan files at
9 issue in that case. Second, it was in anticipation of
10 litigation, because the United States Attorney's Office for
11 the Eastern District of Tennessee actually asked those
12 witnesses to review the loan files for the case after the case
13 had been indicted.

14 And the Sixth Circuit expanded *Clear Channel*, and
15 held that that testimony was admissible. The Sixth Circuit,
16 in expanding *Clear Channel*, in ruling on *Kerley*, they relied
17 on the *Rigas* decision and the *Valencia* decision, both of which
18 involved account- -- both of which involved testimony similar
19 to this. Let's look at *Rigas*. *Rigas* was a Second Circuit
20 case. In *Rigas*, the Adelphia Communications fraud case, there
21 was an accountant who was brought in to examine any
22 restatements that needed to be made after the company was --
23 after the defendants were indicted. So it certainly was in
24 anticipation of litigation.

25 And the United States has briefed this, and the

1 Court has also put an order down, but because of the extensive
2 argument in Court, I'm just going to quickly go through those
3 cases.

4 The Second Circuit in that case found that even
5 though the accountant's testimony was of particular
6 specialized knowledge, because he had been brought in to work
7 at Adelphia, to review the data at issue and the accounting
8 issues at issue, the Second Circuit held that that witness
9 fits in within Rule 701, and did not exclude it.

10 Looking at *Dynegy*, which is a Fifth Circuit case, in
11 that Fifth Circuit case there was an issue about fuel pricing
12 manipulation in that particular case, and there was a risk
13 officer who actually had left the company before he had
14 completed his analysis. And the government asked -- the
15 United States Attorney's Office in that district asked that
16 chief risk officer employee to come back and complete analysis
17 that he had not completed. And the Fifth Circuit, in that
18 case, said that that also fit within 701 because it was based
19 on -- on his personal observations from the records that he
20 reviewed in completing that analysis.

21 So as the United States stated in its brief, that
22 when you look at all of the precedents together, you look at
23 the Sixth Circuit precedent, which was *Kerley*, and you look at
24 the cases that *Kerley* relied upon in reaching its decision,
25 what you find is that proper testimony under Rule 701 includes

1 analysis by a current or even former employee. Mr. Seay is a
2 current employee. He's not even the former employee that --
3 like existed in the *Dynegy* case, which was the *Valencia* case
4 from the Sixth Circuit, regarding an assumed course of
5 conduct's effect on a business. That -- the assumed course of
6 conduct effect on a business, in this instance that would be
7 what effect would a cost plus .05 discount have on a customer
8 who actually received a cost plus .07 discount, regardless of
9 whether the employee was involved in the transaction at issue,
10 so long as the analysis is grounded in the employee's
11 particularized knowledge obtained from the employee's position
12 with the business and is based on the employee's personal
13 review and perception of the materials relevant to the
14 analysis.

15 Mr. Seay has testified that he oversaw the gathering
16 of the data that was used to create the tools. He has
17 explained that those tools were used during the audit process
18 to pay customers back. In fact, I think during his testimony
19 he said during the audit they identified 56 million dollars of
20 fraud during this process, and it was these tools that were
21 used to -- to determine that.

22 The United States asked him to testify -- asked him
23 whether or not those tools were created at the request of the
24 United States, and he explained that they were not. That
25 actually separates us out from -- to some extent, from *Dynegy*,

1 because in the *Dynegy* case that chief risk officer was asked
2 to come back and complete analysis. The tools were already in
3 existence before the United States asked Mr. Seay to -- to add
4 this element to the tools, which is, for example, when you get
5 to BP Express, assume that a cost plus zero was given to BP
6 Express; when we get to Halvor, assume that a cost minus .05
7 was given to Halvor.

8 All that the United States is asking Mr. Seay -- is
9 going to be asking him to do is to say, if Halvor have been
10 given a cost plus .05 -- excuse me, a cost minus .05 during a
11 particular time, what rebate would they have been due -- what
12 additional rebate would they have been due? We're asking him
13 to take that cost minus .05 discount and just feed it into the
14 machine called the manual rebate pivot table and the
15 off-invoice pivot table.

16 So while we need to talk about this under 701
17 because it's based on his particularized knowledge that he
18 gained while he was an employee, at the end of the day what
19 we're talking about, his use of a -- operation of a machine,
20 just to use a simple metaphor, it's a pivot table, but it's a
21 machine where he is just adding one more -- adding a variable
22 to it in the same way in which they did during the audit.

23 As he's described, during the audit they would take
24 the cost plus discount that was determined to be in existence
25 for that customer, feed it into the machine, called the Power

1 Pivot table for manual rebate or the Power Pivot table for
2 off-invoice. That's all the United States has asked him to
3 do. And as a result, he's really no different from the
4 underwriting witnesses in *Kerley* who, after the fact, were
5 asked to say, who did not participate in the loans in
6 question, "SunTrust, if you had been aware that this was
7 fraud, would you have given the loan in question, using your
8 knowledge about SunTrust underwriting practices?"

9 *Kerley* controls this. The advisory committee note
10 in Rule 701 controls this. This is a very straight-forward
11 decision under controlling Sixth Circuit precedent.

12 MS. CHRISTOFF: Your Honor --

13 THE COURT: Ms. Christoff?

14 MS. CHRISTOFF: Thank you. I agree that *Kerley*
15 controls, and I agree that this is straightforward. Obviously
16 I agree with the result of the application of that law.

17 If I could read directly from *Kerley*. The loan
18 officers at issue there "had personal knowledge of their
19 respective employers' underwriting and lending guidelines,
20 policies, and procedures that were in place during 2005 and
21 2006, but also had experience in applying those guidelines and
22 policies to mortgage loans during that time," Your Honor.

23 The fact that the witness is or is not an employee
24 or gained their knowledge while they were an employee is not
25 determinative of the issue. The question is whether the

1 witness had percipient knowledge at the time of the relevant
2 facts that would give them that particularized knowledge.

3 In this case Mr. Seay's knowledge comes only after
4 the FBI raid. So the FBI raids Pilot's headquarters, and
5 multiple lawsuits are filed within days.

6 THE COURT: I've heard that term bandied around a
7 lot, a "raid."

8 MS. CHRISTOFF: A search, Your Honor.

9 THE COURT: It was an execution of a search warrant?

10 MS. CHRISTOFF: An execution of a search warrant in
11 which property was seized from Pilot headquarters by a number
12 of federal agents, I believe. So -- and within days multiple
13 lawsuits were filed. All of the work that Pilot did on this
14 audit was in anticipation of litigation, Your Honor. The
15 definition of anticipation --

16 THE COURT: Has anybody said that? Has any witness
17 said that?

18 MS. CHRISTOFF: No, Your Honor, but the government's
19 burden is -- the burden is on the government to establish this
20 witness is competent to testify under Rule 701.

21 THE COURT: I think during one of the
22 cross-examinations the witness was asked for the reasons why
23 this was done, and I think the attorney brought out that it was
24 done in an effort to maintain good relations with customers and
25 to retain those customers.

1 MS. CHRISTOFF: Customers that had sued Pilot, Your
2 Honor. They were in an active lawsuit with those customers.

3 THE COURT: Was the answer limited to that, to just
4 customers who had filed suit?

5 MS. CHRISTOFF: No, Your Honor, but the law doesn't
6 require that the actions be limited to only dealing with
7 litigation. The fact is that the work was done with the
8 reasonable expectation that litigation would occur, because it
9 already had occurred, Your Honor.

10 THE COURT: And why is that a requirement? Why is
11 the Court's concern with whether someone is doing something in
12 anticipation of litigation? Why is that?

13 MS. CHRISTOFF: I think that's important, Your Honor.
14 The fundamental interest here is the reliability of the
15 information.

16 THE COURT: So the suggestion is, if you are
17 contemplating litigation, you might skew your opinion to help
18 the side of the battle that you're on?

19 MS. CHRISTOFF: That's exactly right, Your Honor.
20 Where -- where a witness gains knowledge through their normal
21 everyday activities as part of their job, there is a lower
22 likelihood that that knowledge would be tainted or impacted by
23 the reason in which the knowledge was acquired, and so it has a
24 higher degree of reliability, and that's why we allow lay
25 witnesses to offer opinions on --

1 THE COURT: And how do you separate that from someone
2 who just wants to maintain good relations with their customers?

3 MS. CHRISTOFF: Well, Your Honor, they --

4 THE COURT: We're talking -- the problem is that you
5 may skew your opinion. So let's say I have an opinion that at
6 noontime there is going to be an eclipse and if there is an
7 eclipse that's good for my customers. I'm also anticipating a
8 lawsuit that I'm causing the eclipse.

9 MS. CHRISTOFF: From-- You are involved in
10 litigation with your customers over whether there is an
11 eclipse?

12 THE COURT: As you know, in the United States you can
13 file a lawsuit for any reason. You may not keep it in court,
14 but you can file it for any reason.

15 MS. CHRISTOFF: Yes, Your Honor. I believe that in
16 that case the customer -- the pending customer lawsuit against
17 you about whether or not there is an eclipse would be highly
18 relevant to your efforts to keep the customer happy about --

19 THE COURT: Would that likely skew my opinion,
20 though?

21 MS. CHRISTOFF: Yes, Your Honor, I believe it was,
22 and I believe the Sixth Circuit precedent is established on
23 that point, that --

24 THE COURT: Would it skew my opinion any more than my
25 desire to retain customers?

1 MS. CHRISTOFF: Yes, Your Honor. Yes, Your Honor, it
2 would, because this is not your normal daily business. This is
3 not how you normally interact with your customers. You're not
4 usually in a lawsuit with your customers. The concept of
5 documents being prepared in anticipation of litigation being
6 less reliable is an established concept in many contexts, Your
7 Honor.

8 THE COURT: If I'm trying to retain customers,
9 perhaps some of the motivation is, I'm trying to prevent future
10 lawsuits.

11 MS. CHRISTOFF: Well, that's a different issue, Your
12 Honor.

13 THE COURT: That's a different issue.

14 MS. CHRISTOFF: Yes.

15 THE COURT: Okay. It's not related to this first
16 issue.

17 MS. CHRISTOFF: No. It's --

18 THE COURT: Completely separate.

19 MS. CHRISTOFF: It's a different analysis that's not
20 applicable here, because there were lawsuits with these
21 customers. They were already -- they had already been sued.

22 THE COURT: And, of course, this is counter-factual.
23 Were there lawsuits that were not filed?

24 MS. CHRISTOFF: I'm sure that there are a lot of
25 lawsuits that have not been filed, in the world.

1 THE COURT: And could some of those lawsuits have not
2 been filed because they were happy with whatever efforts Pilot
3 made?

4 MS. CHRISTOFF: Your Honor, I don't know the answer
5 to that question. But, again, it's the government's burden to
6 establish the competency of this witness.

7 THE COURT: Okay.

8 MR. VERNIA: Your Honor --

9 THE COURT: Yes.

10 MS. CHRISTOFF: And if I could, Your Honor, just
11 quickly address the other cases --

12 THE COURT: Take as much time as you want. You don't
13 have to be quick.

14 MS. CHRISTOFF: Thank you, Your Honor. The other
15 cases cited by the government are similar, in that the
16 witness -- the *Valencia* case, I believe, in particular,
17 Mr. Hamilton referred to, that witness was -- though he had
18 left the company, he was a prior employee and was actively,
19 hands-on involved day to day in the types of -- actually, in
20 that case, in the very subject matter of his testimony.

21 And, again, under the *Kerley* case, the two loan
22 officers at issue, though they may not have had experience
23 with these particular loans, that's what their job was at the
24 time that those loans were approved, was to review files and
25 approve them.

1 So, for example, an analogy here, Your Honor, would
2 be, if Mr. Seay was part of the direct sales team and
3 regularly participated in calculating manual rebates at the
4 time, he just didn't happen to work on these particular
5 customers, perhaps then it would be appropriate.

6 THE COURT: But then he wouldn't -- then he wouldn't
7 have the computer knowledge, though, to offer the opinion that
8 the government wants.

9 MS. CHRISTOFF: I apologize, Your Honor. Can you
10 repeat that?

11 THE COURT: He would not have the computer knowledge
12 to offer the opinion that the government is seeking elicit,
13 though.

14 MS. CHRISTOFF: Right. And that's exactly the point,
15 Your Honor. Mr. Hamilton indicated -- implied that the -- all
16 the witness would be asked to do is plug something in and get
17 something out. But, again, Your Honor, what he is plugging it
18 into is a highly complicated tool that he would not have been
19 able to create, understand, or even conceive of if he didn't
20 have his specialized technical training. And that tool was
21 created in anticipation of litigation.

22 The only reason -- this -- his work on the audit was
23 not his day-to-day activity at Pilot, either before the
24 position that he had on business intelligence, or since. He
25 testified today that he does not do this audit work anymore.

1 This was a special project. It was not his normal business
2 duty. And as part of that special project that was directed
3 towards determining whether customers were defrauded,
4 customers that had already sued Pilot, saying they were, that
5 is when the tool was developed, and that is when all of the
6 relevant knowledge that Mr. Seay has testified about so far
7 was acquired.

8 THE COURT: Thank you.

9 Mr. Vernia?

10 MR. VERNIA: Your Honor, just very briefly. I just
11 want to respond to the inference that I drew from
12 Mr. Hamilton's description of *Kerley*. To the extent that he
13 was implying or I was inferring that *Kerley* overrode *United*
14 *States vs. White* or *United States vs. Ganier*, I think that is
15 clearly not the case. In fact, *Kerley* itself harmonized its
16 finding with *United States vs. White*. I think the proper
17 interpretation of *Kerley* is as Ms. Christoff suggests, and that
18 under Sixth Circuit case law, *White* and *Ganier*, Mr. Seay's
19 testimony is inadmissible. Thank you.

20 THE COURT: Thank you.

21 The governing rule, as everyone has cited, is
22 Rule 701. And Rule 701 allows a lay witness to testify in the
23 form of an opinion or inference when the -- when the opinion
24 or inference, Number 1, is rationally based on the witness's
25 perception, and (2) would help the fact-finder to understand

1 clearly the testimony or determine a fact in issue.

2 The Court has heard the testimony of Mr. Seay, both
3 in response to questions put to him by the government and in
4 questions put to him by the defense. Based upon the Court's
5 questions of the attorneys, the testimony of the witness, and
6 the arguments of counsel, the Court will deny the objections
7 to this witness's being permitted to offer his opinion.

8 The Court notes that the witness indicated that this
9 work was done in an effort to maintain good relations with
10 their customers and to retain those customers. Obviously
11 there have been some weaknesses shown in the witness's
12 background, and perhaps even with respect to his work, but the
13 Court concludes that those weaknesses go to the weight to be
14 given to the witness's opinion and not to whether the opinion
15 itself is admissible. So the witness will be allowed to
16 testify.

17 As the Court said yesterday, the Court is going to
18 perform a wedding at 12 noon. I've seen a young woman dressed
19 in white flitting back and forth in front of the window
20 outside, so I think that they might be there. So why don't we
21 take our lunch break now.

22 We have a hearing on the media's request for certain
23 records at 1:15. So the lawyers should come back at 1:15.
24 And the jury should expect to come back -- I'd say 1:45 or so.
25 We'll stand in recess.

1 (Luncheon recess.)

2 (Brief recess.)

3 THE COURT: Please proceed, counsel. Proceed.

4 DIRECT EXAMINATION (Continuing)

5 BY MR. HAMILTON:

6 Q Mr. Seay, we will continue now, and I'd like to
7 direct your attention to Government Exhibits 810A, 1522A,
8 1613A, 1712A, and 1826A. Let me know once you've had an
9 opportunity to look at those again.

10 A I have.

11 Q And, generally speaking, what are those documents?

12 A These are dis- -- the customer discount comparison
13 summaries.

14 Q And did you prepare those documents?

15 A I did.

16 Q Is the data that you used to prepare those documents
17 voluminous in nature?

18 A It is.

19 Q How were the documents, the exhibits that I just
20 named, prepared?

21 A They were generated out of a manual rebate Power
22 Pivot tool.

23 Q And were those -- in preparing those documents, did
24 you rely exclusively upon particularized knowledge that you
25 gained during your employment at Pilot?

1 A I did.

2 Q Is the data that those documents summarize kept and
3 maintained or integrated in the ordinary course of Pilot
4 business?

5 A Yes.

6 Q And is it the ordinary course of Pilot business to
7 rely on the data -- the voluminous data that is summarized in
8 the exhibits that I numbered?

9 A It is.

10 MR. HAMILTON: May I have the document camera,
11 please, for the witness only, please. This is a document that
12 the United States is marking at this time for identification
13 only. This document is marked for identification as Exhibit
14 4001, Government Exhibit 4001. And, also for the record, this
15 is part of the -- the Court's record at Exhibit 1 to Document
16 Number 234 in the clerk's office.

17 BY MR. HAMILTON:

18 Q And can you tell us what this document is? Do you
19 see the first page of it?

20 A I do.

21 Q And just so I make a complete record, the document's
22 been marked as 4001. Can you see me holding it right now?

23 A I do.

24 Q And is it a multi-page document?

25 A It is.

1 Q And I'm turning to the -- I'm turning to Page 8 of
2 4001. And is it a document that's dated March 24 of 2017?

3 A Yes.

4 Q And can you tell us what that document is. Let me
5 flip to the-- Do you recognize this document?

6 A I do. Commission breakdown summary.

7 Q Well, looking at the--

8 May I pass it to the witness, please.

9 A (Witness complying.)

10 MR. HAMILTON: May I have it back.

11 (Brief pause.)

12 BY MR. HAMILTON:

13 Q Is this a document that you prepared with the
14 assistance of counsel for the company?

15 A It is.

16 Q Was it to be prepared to be submitted to the United
17 States Attorney's office?

18 A Yes.

19 Q And in this document, are the locations for the data
20 that supports the summaries that you just identified as the --
21 the electronic folder location of that data described in
22 detail as to where to find it?

23 A Yes.

24 Q And is it described that the -- that the data that
25 is traveling -- where that data could be found and electronic

1 folders that are traveling with the cost comparisons that you
2 made?

3 A Yes.

4 Q And if the data that was in the folder -- the
5 electronic folders that you provided with the summaries that
6 you prepared, if that data was provided to the opposing
7 parties, would that constitute the backup data for the
8 summaries that you prepared?

9 A Yes.

10 Q And is -- are the summaries that we just listed by
11 exhibit number, are those accurate -- accurate summaries of
12 the voluminous data that was identified in 4001 in all those
13 electronic folders?

14 A Yes.

15 MR. HAMILTON: The United States moves Government's
16 Exhibits 810A, 1522A, 1613A, 1712A, and 1826A into evidence as
17 Rule 1006 voluminous record summaries.

18 MS. CHRISTOFF: Objection, Your Honor. The
19 defendants object to the admission of these exhibits under
20 Rule 1006.

21 THE COURT: And are the reasons the same as were
22 advanced earlier?

23 MS. CHRISTOFF: They are not, Your Honor. There is a
24 five-step test under *United States vs. Bray*, and we believe the
25 government has failed to establish its burden under each

1 element. I'm prepared to go through them if you'd like.

2 THE COURT: Okay. Why don't we do that.

3 MS. CHRISTOFF: Thank you, Your Honor. The first
4 requirement is that the documents being summarized are so
5 voluminous that the documents could not be conveniently
6 examined in court. As to two of these --

7 THE COURT: Do you take issue with that?

8 MS. CHRISTOFF: I do, Your Honor, as to two of the
9 exhibits. The exhibits summarizing the Ryder documents, I
10 believe, summarize only two rebates, two. And the document
11 summarizing the Amerifreight rebates is only one rebate, Your
12 Honor. So that's hardly a voluminous amount of documents. The
13 second --

14 THE COURT: Mr. Hamilton, how voluminous are the
15 documents?

16 MR. HAMILTON: Well, I think it would be helpful-- I
17 can make a proffer. It might be helpful to turn to Mr. Seay
18 about it. My understanding is that although there is one month
19 for Amerifreight, it doesn't change the fact that that month
20 requires, to generate that calculation, data pulls from the
21 different sources. That is -- that was a manual rebate
22 customer, so the components that he described in the first part
23 of his testimony, the data that would be required to generate
24 that one month, can't be conveniently brought into the court,
25 first, because it's coming from multiple sources, but, also,

1 the way -- this is electronically maintained data that could
2 really only be queried that way. It would not be convenient
3 under 1006 to bring that data into court.

4 THE COURT: Would you just ask that one question,
5 then?

6 MR. HAMILTON: Yes.

7 THE COURT: And ask it in such a way that he can
8 answer it yes or no?

9 MR. HAMILTON: Yes, sir.

10 BY MR. HAMILTON:

11 Q With respect to Amerifreight cost comparison, 1613A,
12 can that -- the data that underlay that report, can it be
13 conveniently brought into court and examined outside of that
14 summary?

15 A I would say no.

16 Q And turning to Ryder, which is Government
17 Exhibit 1826A, can that -- the data that underlay that report,
18 that summary, can it be conveniently brought into court and
19 examined?

20 A I'd say no.

21 MS. CHRISTOFF: Your Honor, may I briefly voir dire
22 the witness on that issue?

23 THE COURT: You want to ask him questions about the
24 inconvenience or the volume of the underlying records?

25 MS. CHRISTOFF: The volume, in particular.

1 THE COURT: I think that under this test the Court is
2 also supposed to consider the matter of convenience, whether it
3 would be convenient to bring the records in.

4 MS. CHRISTOFF: Yes, Your Honor. Actually that
5 feeds into my argument on the second element.

6 THE COURT: Okay. Why don't you ask your question
7 from there. And can you do it in one question, or do you need
8 more than one?

9 MS. CHRISTOFF: I can try to do it in one question,
10 Your Honor.

11 THE COURT: Let's see where we go.

12 MS. CHRISTOFF: Thank you.

13 VOIR DIRE EXAMINATION

14 BY MS. CHRISTOFF:

15 Q Mr. Seay, what is the volume of documents that we're
16 talking about?

17 A Well, we -- obviously it's going through -- you
18 know, the way the tool operates, the cost plus information, we
19 would utilize the source data, which would be, you know,
20 thousands and thousands of records for that.

21 Also, the customer transaction files, I'm not sure
22 the magnitude of those, but the ones that were sourced from
23 PRS would be quite a number of records as well.

24 Q So you don't know the volume?

25 THE COURT: He said "thousands and thousands."

1 BY MS. CHRISTOFF:

2 Q That were searched through, but not that are being
3 summarized here, correct?

4 A But the source is -- the way the data is acquired,
5 is --

6 THE COURT: It's underlying data, though, isn't it?

7 MS. CHRISTOFF: Well, Mr. Seay's probably better to
8 answer that question, Your Honor, but I believe it is
9 electronic data that is electronically stored in the database.

10 THE COURT: Right. And, conceivably, you could bring
11 in each bit of electronic data into court and display it.

12 MS. CHRISTOFF: Well, Your Honor, I believe that
13 there are records underlying each transaction that's being
14 summarized here.

15 THE COURT: Well, I thought he said "thousands and
16 thousands." That seems like a lot to me.

17 MS. CHRISTOFF: I believe "thousands and thousands"
18 is the volume of available data from which the specific data
19 being summarized here would have to be selected.

20 THE COURT: Why don't you clarify that, then.

21 BY MS. CHRISTOFF:

22 Q Is that the case, Mr. Seay? You're talking about
23 thousands and thousands of documents that exist within the
24 database, correct?

25 A Correct. But in the case of a customer's fuel

1 purchases over a given month, just given the OPIS data alone,
2 you would have one OPIS valuation per product per store per
3 day. Of course of the travel center's a cost organization.
4 You know, you have 30 days in the month, plus, you know,
5 500-plus travel centers. Now we're talking about 1500 records
6 for a single month, for just the cost plus information.

7 Q Well, but you don't know that, for example,
8 Amerifreight made a purchase at all 500 travel centers on that
9 day?

10 A I do not know that.

11 Q So it could be one purchase per day, for a total of
12 30, correct?

13 A It would definitely be more than that, but it would
14 be fewer than the total, yes.

15 Q And you don't know, do you?

16 A No.

17 MS. CHRISTOFF: So, Your Honor, we have not
18 established that --

19 THE COURT: Do you think 30 would be -- oh, what's
20 the language -- voluminous?

21 MS. CHRISTOFF: I do not think 30 is voluminous, no,
22 Your Honor, particularly when we're talking about a comparison
23 to thousands of documents. I believe the standard in the case
24 law is for scores of documents, not 30 documents. And
25 regardless-- And, again, Your Honor, it's the government's

1 burden to establish that they're voluminous. And the witness
2 has established he doesn't know the volume.

3 THE COURT: And what's the next factor?

4 MS. CHRISTOFF: The next factor is whether the
5 documents being summarized were made available to the
6 defendants. And I believe we established in the prior court
7 hearing, Your Honor, that --

8 THE COURT: I don't know if he's in a position to
9 answer that. I think Mr. Hamilton would answer that.

10 MR. HAMILTON: That's why the-- If I may speak, Your
11 Honor. That's why the United States marked Government Exhibit
12 4001 and had the witness establish that -- and may I pass that
13 to the Court, Your Honor? 4001? Or do I just make --

14 THE COURT: As long as counsel knows what you're
15 talking about, there's no need for the Court to see it.

16 MS. CHRISTOFF: I do know what he's talking about,
17 Your Honor, and I believe that in particular my argument is
18 directed at the Price Fetch database, which is not addressed in
19 the document that Mr. Hamilton is referring to, and which the
20 witness testified was a primary source of information using the
21 summaries, was never provided to the defendants.

22 In addition, Your Honor, we're not just talking
23 about the databases themselves but also the queries that the
24 witness testified are essential to extract the information
25 from the databases. Those queries were never provided to the

1 defendant. So in that case, even if the raw data that Your
2 Honor just noted would be little pieces of information stored
3 in a database, even if that hard drive were provided to the
4 defendants, it would be useless without the queries that
5 counsel for Pilot ran to provide to the government to identify
6 this information, because the defendants would have no way to
7 verify whether those queries were properly drafted and then to
8 run them themselves to determine whether the results of the
9 queries were accurately reflected in -- again, in this
10 summary.

11 MR. HAMILTON: May I respond?

12 THE COURT: So even if you were given the -- I think
13 in computerese, it's the ones and zeros. So if you had all the
14 ones and zeros, you could not intelligently interpret those
15 without some type of other tool.

16 MS. CHRISTOFF: That is exactly accurate, Your Honor.
17 And there is also a third aspect to this that the witness
18 established during voir dire, that the versions of the
19 documents that were given to defendants are not necessarily the
20 same versions that were queried, for example, when searches
21 were run this past fall in preparing these summaries. The
22 defendant --

23 THE COURT: Does the rule require that the documents
24 be given to the other side?

25 MS. CHRISTOFF: Be made available, Your Honor.

1 THE COURT: Just be made available, not given.

2 MS. CHRISTOFF: That's correct. And that did not
3 occur in this case.

4 MR. HAMILTON: May I address the Court on this, Your
5 Honor? So before Ms. Christoff made her objection, I -- the
6 Court, I'm sure, heard Mr. Seay explain the document that is
7 part of Government's Exhibit 4001, which is a 11-page letter
8 that Mr. Seay -- in a letter format, where Mr. Seay
9 meticulously, paragraph by paragraph, goes through the column
10 for each -- for each summary, goes through each column of data
11 and states precisely where that data can be found in an
12 electronic folder that is traveling with this letter that he
13 has put together.

14 THE COURT: Excuse me for my ignorance, but what is
15 an electronic folder?

16 MR. HAMILTON: The way in which the United States --
17 the way in which this data needed to be produced is
18 electronically because it was so voluminous in nature. And
19 what the United States asked counsel for Pilot to do was to
20 place this data into very well-organized electronic folders,
21 organized by topics, and in a very workmanlike, meticulous
22 fashion. You can look in this letter and see how in each
23 paragraph the electronic folder in which the data is housed is
24 clearly identified and shows what supports what summary and
25 what column, and that -- that traveled with a March 29th, 2017

1 letter, which is marked at Exhibit 4001 to defense counsel.

2 And so that's what Mr. -- I had Mr. Seay confirm
3 that the electronic data that traveled with his report, if
4 that were produced to defense counsel, then they would have
5 the data that underlay his reports, and he confirmed that.
6 And now I am representing to the Court that this -- I don't
7 believe that it will be disputed that the March 29th, 2017,
8 letter was produced to counsel, along with his letter, along
9 with all of the electronic folders that are referenced in the
10 letter. I certainly didn't hear that anyone didn't get an
11 electronic folder that was identified in that.

12 My next point, Your Honor, is that I have -- this is
13 part of the record. It's Exhibit 7, Document Number 234,
14 which is part of the United States' response to a motion
15 practice, is that one of the counsel for the defense group
16 represented to the United States that it understood that with
17 respect to the Ascend -- Pilot Ascend databases, that it would
18 have to go directly to the company, and that it represented to
19 the United States that it would work with counsel for the
20 company, Neal & Harwell, to obtain access to that data, to the
21 Lawson/Ascend database.

22 And, finally, responding to the Price Fetch
23 argument, that -- that is a red herring, Your Honor. The data
24 that -- all the data that underlays, as Mr. Seay just
25 testified, the -- his summaries, was included in the

1 electronic folders that traveled with his letter. The fact
2 that they do not have access to a Price Fetch database—which,
3 by the way, the United States did not seize a Price Fetch
4 database, so therefore did not have it to disclose to the
5 defense—and the defense, you know, had company counsel's
6 number, and knows how to reach them, that they could have made
7 request -- made a request for that and sought some cooperation
8 there. That is outside the control of the United States. The
9 United States has produced, in compliance with Rule 1006, the
10 data that underlaid the summary, and the witness confirmed it,
11 and I'm representing to the Court that this 4001 letter was
12 produced to counsel.

13 MS. CHRISTOFF: Your Honor, the documents that
14 Mr. Hamilton refers to as being provided to the defendants were
15 themselves summaries of the information in the databases. They
16 were the results of these queries, the SQL searches that we
17 asked the witness about. Providing the results of a search
18 that we have no ability to verify does not give defendants
19 access to this underlying information.

20 And according to *Bray*, the purpose of this
21 requirement is to provide the opposing parties who decide
22 to -- to attack the authenticity or accuracy of a chart
23 summary or calculation with an opportunity to prepare for
24 cross-examination. That is not what we were provided in this
25 case, Your Honor. We were provided with the results that the

1 government requested, through Neal & Harwell, of Pilot to
2 prepare.

3 THE COURT: The databases that contain the ones and
4 zeros, they were not in these electronic folders?

5 MS. CHRISTOFF: They were not, no, Your Honor.

6 THE COURT: Okay. Based upon the information
7 provided by the government, did you know where the ones and
8 zeros were located?

9 MS. CHRISTOFF: I apologize, Your Honor. Can you
10 repeat that, please?

11 THE COURT: Based upon the communication from the
12 government, did you know where the ones and zeros were -- or
13 the databases that contained the ones and zeros were located?

14 MS. CHRISTOFF: Yes, Your Honor. They are located at
15 Pilot. And I believe that efforts were made to work with
16 counsel for Pilot, and those efforts were unsuccessful. We
17 were not granted access to the databases.

18 THE COURT: Did you exercise any rights under federal
19 law to get the materials?

20 MS. CHRISTOFF: I do not believe that any efforts
21 were taken once the government referred us to counsel for
22 Near and -- Neal & Harwell, counsel for Pilot, and that request
23 was rejected.

24 MR. HAMILTON: May I --

25 THE COURT: And the rule requires that the

1 information be available to the other side. Did the government
2 have any greater right to obtain the materials than the defense
3 did?

4 MS. CHRISTOFF: Yes, Your Honor. The --

5 THE COURT: And where does that right come from?

6 MS. CHRISTOFF: Well, Pilot is under an obligation to
7 comply and assist the government. And the government is the
8 proponent of this evidence, and therefore it is the
9 government's burden to -- as the proponent, to make it
10 available.

11 MR. HAMILTON: Your Honor, may I respond?

12 THE COURT: Is that what the rule says?

13 MS. CHRISTOFF: *Bray* says, Your Honor, "The proponent
14 of the summary must also have made the documents available for
15 examination or copying, or both, by other parties at a
16 reasonable time and place."

17 The rule does not say, "Ask somebody else."

18 THE COURT: Well, one of the cases -- it's *Air*
19 *Safety, Incorporated, vs. Roman Catholic Archbishop of Boston*.
20 Have you heard of that case?

21 MS. CHRISTOFF: No, Your Honor.

22 THE COURT: It says that to satisfy the making
23 available requirement, a party seeking to use a summary under
24 Rule 106 [sic] must identify its exhibits as such, that is,
25 they must be listed as exhibits, provide a list or description

1 of the documents supporting the exhibit, and state when and
2 where they may be reviewed.

3 So if Mr. Hamilton said, "You can get them from
4 Pilot," and Pilot did not comply, I think that, as a defendant
5 in a criminal case, there's some authority that the federal
6 court would provide which would ensure that you would have
7 those records, wouldn't you?

8 MS. CHRISTOFF: Well, Your Honor, based on the style
9 of the case that you gave, *Archdiocese of Boston*, I am guessing
10 that that is not a Sixth Circuit case; whereas, *United States*
11 *vs. Bray* is a Sixth Circuit case, and again --

12 THE COURT: I think we had that this morning. You
13 only like Sixth Circuit cases, huh?

14 MS. CHRISTOFF: Unfortunately that is what we are
15 bound by, Your Honor.

16 THE COURT: Did you clerk on the circuit?

17 MS. CHRISTOFF: No, Your Honor. I clerked in the
18 Western District.

19 THE COURT: In the Western District of Tennessee?

20 MS. CHRISTOFF: Yes. Yes.

21 THE COURT: Okay. But not in the Sixth Circuit. Oh,
22 well, that is in the Sixth Circuit, but that's not on the Sixth
23 Circuit.

24 MR. HAMILTON: May I?

25 THE COURT: Sometimes there are differences in the

1 circuits, on procedural rules, but not nearly as much as you
2 would think. I would be surprised that the Sixth Circuit would
3 view this any differently. Sometimes, in the old days—we
4 don't have it anymore—but sometimes parties would have records
5 that would take two or three railroad boxcars. And it would
6 not be possible to take those boxcars to the opponent's office
7 and just drop them off. So what you would do would be to say,
8 "Well, this is where the documents are, and you just go there
9 and you look at them."

10 When I was a youngster and practiced law myself, I
11 had several cases where we would have a roomful of documents,
12 and I would just tell the other side where the documents were,
13 and the other side could come and go through the documents as
14 much as they wanted. But it would have been very difficult
15 for a lawyer in my shoes in that case to take all those
16 documents and transport them to another location and present
17 them.

18 With electronic media, it's a little bit different
19 now because we can take an awful lot of information, because
20 they're all in ones and zeros, and put them on hard disks or
21 flash drives or other things and transport those. But the
22 original source is always going to be someplace else. And
23 most individuals and most companies would not want to give up
24 their server or whatever the site of their ones and zeros. So
25 I think we're always looking at either some type of access to

1 it or copies of it.

2 MS. CHRISTOFF: I agree, Your Honor. Yes, I think
3 that's actually exactly what we're talking about.

4 THE COURT: So as long as you're pointed to where the
5 documents are, why is that not made available?

6 MS. CHRISTOFF: Your Honor, the request was denied.
7 They were not available. We were not able to obtain them.
8 Your Honor --

9 THE COURT: They were not denied by the government,
10 right? They were denied by the third party that held them,
11 right?

12 MS. CHRISTOFF: That's right, Your Honor. But the
13 government is the proponent of the information. I believe
14 Mr. Vernia has something.

15 THE COURT: And under federal law, you have the right
16 to subpoena. So a subpoena could have been issued to the other
17 party, and if they failed to comply with the subpoena, they
18 would have been put in jail and held in jail until they decided
19 to give you the access that you needed, right?

20 MS. CHRISTOFF: Yes, Your Honor. The company here
21 had an obligation to provide these documents to the government.

22 THE COURT: They also had an obligation to provide
23 you -- if you had sought the authority of the Court, they would
24 also have an obligation to you, to supply you with the
25 information.

1 MR. VERNIA: Your Honor, if I could just clarify a
2 factual --

3 THE COURT: I don't think she needs any help. Let
4 her finish, and you can -- you can act as cleanup hitter later
5 on. But let her finish.

6 MS. CHRISTOFF: Your Honor, the defendants are
7 situated such that engaging in a lawsuit with the company would
8 not be in their best interest.

9 THE COURT: Well, that wouldn't be a lawsuit.

10 MS. CHRISTOFF: Well, it would result in a
11 miscellaneous action if it were a subpoena that were not
12 complied with.

13 THE COURT: Well, most people, if they receive a
14 subpoena, they obey it. I can count the times on one hand when
15 I have had to order someone to comply with a subpoena, and even
16 fewer times I've had to put somebody in jail for not complying
17 with a subpoena.

18 In this country, regardless of what -- the bad
19 feelings, or the hostility, or whatnot, once you give them
20 that federal court subpoena they become very cooperative. And
21 there is a reason why we have this power, because we want
22 people to be able to obtain things that they need.

23 MS. CHRISTOFF: Well, Your Honor, I agree with you.
24 I still submit, though, that the government, as the proponent
25 of the evidence, has the obligation to make it available for

1 defendants. The -- it is not incumbent upon the defendants to
2 take those measures. The onus is not on the defendants to seek
3 out this information. The company is obligated to provide it
4 to the government, and the government is obligated to provide
5 it to defendants.

6 THE COURT: Or make it in terms of the rule.

7 MR. HAMILTON: If --

8 THE COURT: Make it available. Did you notify
9 Mr. Hamilton that Pilot was being recalcitrant and was not
10 allowing you access to the materials?

11 MR. HAMILTON: (Moving head from side to side.)

12 MS. CHRISTOFF: Your Honor, if I may, Mr. Vernia can
13 clarify the facts on that, because I was actually not involved
14 in that discussion.

15 THE COURT: Okay. So she does need some help now.

16 MS. CHRISTOFF: I do, Your Honor. Thank you.

17 MR. VERNIA: Solely on the facts, Your Honor.

18 THE COURT: You are the cleanup hitter.

19 MR. VERNIA: Your Honor, I believe that this issue
20 predated Ms. Christoff's joining the case. And because I was
21 the principal one involved in that, I do want to clarify the
22 record. We asked the government for copies of the Ascend and
23 Lawson databases, and the government did provide those, and I
24 don't believe we have any complaints about the government's
25 compliance with discovery requests in that respect.

1 With respect to Price Fetch, that issue came up in
2 connection with the original Rule 701 motion in which we, I
3 believe, pointed out that we had not received a copy of the
4 Price Fetch nor had we been given these queries of the
5 databases. The Court ruled on that, and that was where that
6 issue lay. We did not receive any refusals to cooperate from
7 Pilot Travel Centers because we made no such requests with
8 respect to Price Fetch, Your Honor. So I just want to make
9 sure that the record was clear as to that.

10 THE COURT: So, again, going back to "made
11 available," and the case says that the government must state
12 when and where the records may be reviewed. So the defendants
13 knew that the record -- the ones and zeros or the databases
14 that contain the ones and zeros were located at Pilot, and they
15 knew that you could obtain them from them, whether voluntarily
16 or by force of court subpoena.

17 MS. CHRISTOFF: Your Honor, one other point of
18 clarification. If Your Honor remembers back to the beginning
19 of the case, there was a dispute in which defendants issued
20 subpoenas to Pilot, and that did result in litigation before
21 Your Honor.

22 THE COURT: And that was when? That was when?

23 MS. CHRISTOFF: At the beginning of trial, Your
24 Honor.

25 THE COURT: That was just a few weeks ago.

1 MR. HAMILTON: Well, the one --

2 MS. CHRISTOFF: In November.

3 THE COURT: I think that with a 106 [sic] -- I'm
4 sorry, 1006, that notice would have been given months ago, not
5 weeks ago, right?

6 MS. CHRISTOFF: Yes, Your Honor. I'm just merely
7 making the point that to assume that the company would have
8 complied with a subpoena is a demonstrably faulty assumption.

9 MR. HAMILTON: Well, may I --

10 THE COURT: "Demonstrably"?

11 MS. CHRISTOFF: There are other subpoenas --

12 THE COURT: Huh?

13 MS. CHRISTOFF: -- that they refused to comply with.

14 MR. HAMILTON: May I respond, Your Honor? That
15 subpoena was withdrawn.

16 THE COURT: Well, if -- assuming that a subpoena had
17 been issued, let's say, months ago, and there was not voluntary
18 compliance, we would have had time to litigate it, wouldn't we?
19 That's very difficult if a subpoena has been issued on the
20 verge of trial, isn't it?

21 MS. CHRISTOFF: Yes, Your Honor. But, again, this is
22 information that the government is obligated to provide to
23 defendants and they --

24 THE COURT: Okay. And what's the next factor?

25 MS. CHRISTOFF: Oh, I apologize, Your Honor. Thank

1 you. The third element, Your Honor, is, the underlying
2 documents themselves are admissible. And in this case, we
3 submit that the documents are not admissible, they are hearsay.
4 Anticipating an argument for a hearsay objection under
5 Rule 803(6), these documents do not qualify as business
6 records. They are a bit-- The witness has established that he
7 does not know that all the records were kept in the ordinary
8 course of business, he does not know that they were created by
9 a person with knowledge at or near the time of the transactions
10 at issue, he does not know that making records was a regular
11 practice.

12 And, most importantly, Your Honor, the -- the
13 sources of those -- of the information in those documents and
14 the method and circumstances of its preparation has a lack of
15 trustworthiness, and this is an essential requirement under
16 the rule, Your Honor. And here I would cite a case out of the
17 Eastern District of Kentucky, *In re Black Diamond Mining*
18 *Company*, where the court says that business records are deemed
19 reliable because businesses have no reason to lie to
20 themselves. And the court said, in that case, if there is a
21 question about whether someone within the business might have
22 been untruthful in the records, then there is a good
23 suggestion that the records have a lack of trustworthiness.
24 And the court clarified here that, "The court in no way means
25 to suggest that there is a very good chance that Ms. Shafer

1 was lying about the information in those documents, but merely
2 that the e-mail does not rise to the level of trustworthiness
3 that justifies the exception."

4 So there's no question that these are hearsay
5 documents, Your Honor, and so do they qualify for the
6 exception because they --

7 THE COURT: And, again, how many documents are we
8 talking about?

9 MS. CHRISTOFF: Well, in some cases, Your Honor, it's
10 thousands of documents.

11 THE COURT: And maybe even hundreds of thousands of
12 documents?

13 MS. CHRISTOFF: Yes, Your Honor. And --

14 THE COURT: And because they're in digital form,
15 they're actually ones and zeros, so you probably get millions,
16 if not billions, of ones and zeros. Is that right?

17 MS. CHRISTOFF: I believe that is right, Your Honor.

18 THE COURT: Okay. And I guess you concede that they
19 were used in the regular course of business for the company,
20 for the most part? Some may not have been, but, for the most
21 part, some were?

22 MS. CHRISTOFF: I don't-- I believe that there has
23 been testimony that perhaps establishes that some were, and
24 there has definitely been a lack of testimony as to whether
25 others were.

1 MR. HAMILTON: May I respond?

2 MS. CHRISTOFF: So, yes, Your Honor.

3 THE COURT: Well -- and from your earlier argument
4 that Pilot Flying J did not allow you access, I think we can
5 assume that these records were in the possession of Pilot
6 Flying J?

7 MS. CHRISTOFF: They were in the possession, yes,
8 Your Honor.

9 THE COURT: And they were in the possession of Pilot
10 Flying J because they were being used in the business of Pilot
11 Flying J?

12 MS. CHRISTOFF: I don't believe that we heard
13 testimony on that point, as to all.

14 THE COURT: We're not talking about testimony now.
15 We're talking about logic. Okay?

16 MS. CHRISTOFF: I'm not an employee of Pilot, Your
17 Honor. I don't know how the company --

18 THE COURT: No, but you're an intelligent person.
19 You went to college. You graduated from college with
20 distinction. You then went to law school. You did extremely
21 well in law school. You applied for a clerkship with a federal
22 judge. You got a clerkship with a distinguished judge in
23 Memphis. That judge relied upon you. That judge found that
24 you had good judgment, good intellect, and helped the judge.
25 So I think you are a person with pretty good judgment, and I

1 think you're able to form an opinion as to whether a large
2 company—and I think I've heard testimony this is the largest
3 fuel oil distributor in the nation, with over 20,000
4 employees—has this huge database, and they've got an awful lot
5 of information on it, and I think we probably can conclude that
6 the reason they have that material there is because they want
7 it for the business.

8 MS. CHRISTOFF: Your Honor, I believe-- I would
9 agree with you that some of the documents would likely be
10 documents Pilot would use in their business and some would be
11 documents that they created in anticipation of litigation,
12 which we've also heard testimony on.

13 THE COURT: And I think we can tell, with respect to
14 some of the ones and zeros, when the ones and zeros were put on
15 the medium that keeps them, can't we?

16 MS. CHRISTOFF: We can tell that the ones and zeros
17 are ones and zeros?

18 THE COURT: No.

19 MS. CHRISTOFF: All right.

20 THE COURT: You can tell whether one and zero was put
21 in the record today, as to put in the record ten years ago.

22 MS. CHRISTOFF: No, actually, Your Honor, I believe
23 the witness testified that he either was not aware or was
24 pretty sure that there was not an audit trail for some of these
25 documents.

1 THE COURT: Well, we're not talking about what the
2 witness said. We're talking about logic again.

3 MS. CHRISTOFF: I don't believe that for some of the
4 documents you would be able to tell when it was entered into
5 the system.

6 THE COURT: So you don't think an examination of a
7 computer system can tell whether a document was recent or
8 whether a document was ancient? You can't tell that at all?

9 MS. CHRISTOFF: So, Your Honor, we are actually --
10 we're talking about the ones and zeros. It's not -- it's
11 not -- in some cases there are scans of actual documents, in
12 some there are not. It really is just data that is imported
13 into the system, and so, no, I'm not sure you can tell that.

14 THE COURT: Well, the ones and zeros go at a certain
15 place on a hard drive, or a disk, or whatever the medium is.
16 And there's some -- I've forgotten what it's called, but
17 there's some type of master log or calendar that assigns it to
18 a location, tells it where to go.

19 MS. CHRISTOFF: I believe that --

20 THE COURT: And doesn't that have some type of date
21 tag on it?

22 MS. CHRISTOFF: Your Honor, I believe that's exactly
23 what we asked the witness about --

24 THE COURT: Huh?

25 MS. CHRISTOFF: -- and he was not -- he was not

1 positive.

2 THE COURT: Well, see, again, we're not talking about
3 this witness's testimony. We're talking about logic again.
4 So, yes, what you're saying is, there is a way to tell whether
5 something is old or whether something is new.

6 MS. CHRISTOFF: Only if that document that you
7 referred to exists, Your Honor. And --

8 THE COURT: Well, it's not a document. It's ones and
9 zeros. It's not a document.

10 MS. CHRISTOFF: No -- well, I'm sorry, Your Honor,
11 the system you referred to that enables you to track things
12 like --

13 THE COURT: Isn't that true of all -- isn't that true
14 of all computer systems, though?

15 MS. CHRISTOFF: I don't believe so, Your Honor, no.

16 THE COURT: You don't think that's true of all
17 computer systems?

18 MS. CHRISTOFF: No, I -- I'm not an expert, but -- we
19 can ask Mr. Seay, but I don't know.

20 THE COURT: Okay.

21 MS. CHRISTOFF: I don't think so.

22 THE COURT: Okay. But assuming as a matter of just
23 pure logic, now, that a company has a huge volume of materials
24 on their hard drive. And we can conceive of some circumstances
25 where some of that material may be there for some other reason.

1 Perhaps somebody likes watching movies and they keep their
2 movies on the company's hard drive, or they like gardening and
3 they keep gardening materials there. But most of the stuff on
4 it is going to be for the company's business, isn't it?

5 MS. CHRISTOFF: Ostensibly.

6 MR. HAMILTON: Your Honor, may I --

7 MS. CHRISTOFF: Your Honor, I think --

8 THE COURT: What's the next one?

9 MS. CHRISTOFF: Well, Your Honor, just to clarify, my
10 argument here is not that they were somehow related -- that
11 they were not somehow related to Pilot's business; it's that
12 the numbers themselves are untrustworthy, they-- The reason
13 that we allow business records, this exception to the hearsay
14 rule, is because they tend to have an indicia of
15 trustworthiness, because if they're part of the everyday
16 business of the company, then there's no reason to suspect that
17 they would have been tampered with.

18 Here, we know for a fact that the documents and the
19 numbers have been tampered with. And that's why they lack
20 that indicia of trustworthiness and cannot qualify under the
21 business records exception.

22 THE COURT: Do you have any idea how many documents
23 we're talking about?

24 MS. CHRISTOFF: I don't, Your Honor. That goes back
25 to the first argument.

1 THE COURT: You have no idea at all?

2 MS. CHRISTOFF: I have no idea.

3 THE COURT: I don't, either, but, with Pilot, my
4 guess would be we're talking about thousands upon thousands of
5 documents. Out of those thousands and thousands of documents,
6 how many do you think might have been erroneous?

7 MS. CHRISTOFF: As it relates to this case? I think
8 the --

9 THE COURT: Well --

10 MS. CHRISTOFF: -- government's had a good deal of
11 them.

12 THE COURT: -- we're talking about the reliability of
13 the database. So the reliability of the database doesn't have
14 anything to do with this case.

15 MS. CHRISTOFF: No, Your Honor. I'm talking about
16 the reliability of the data underlying -- the data that is
17 being summarized here, not the database, the data contained in
18 the database.

19 THE COURT: Okay. What's your next point?

20 MS. CHRISTOFF: The fourth element is that the
21 summary is accurate and nonprejudicial, Your Honor. This is a
22 requirement that the summary does not contain opinion testimony
23 or inference. So this is a very simple element of the 1006
24 requirement. This chart does indeed contain opinion and
25 inference, and therefore it is improper under 1006.

1 THE COURT: Are those opinions set out in numbers?

2 MS. CHRISTOFF: It is set out in a column, Your
3 Honor, I believe the column entitled Rebate Amount If Cost Plus
4 Zero Used. "If."

5 THE COURT: And generally when we have columns, we
6 have numbers under the columns?

7 MS. CHRISTOFF: Yes, Your Honor.

8 THE COURT: Okay. And what's the last one?

9 MS. CHRISTOFF: The last element?

10 THE COURT: Yes.

11 MS. CHRISTOFF: The last element is that the summary
12 was prepared by -- that the witness testifying about the
13 summary prepared the summary.

14 MR. HAMILTON: That's not the --

15 MS. CHRISTOFF: Excuse me, Mr. Hamilton?

16 MR. HAMILTON: I'm sorry, I've looked, it's
17 "supervised its preparation," that's the --

18 MS. CHRISTOFF: Supervised. Thank you.

19 MR. HAMILTON: Yeah.

20 MS. CHRISTOFF: Supervised it's preparation. And I
21 believe that the--

22 Thank you.

23 I believe the witness testified that he did not in
24 all cases supervise its preparation. In fact, I asked him
25 about the source of an entire column of information on one of

1 these documents, and he thought it came from a different place
2 than it actually had. So the witness is not competent to
3 testify on that subject, either.

4 THE COURT: Okay. Thank you.

5 Mr. Hamilton?

6 MR. HAMILTON: All right. So looking at *Bray*, the
7 first is that it's voluminous. The United States submits that
8 it's voluminous, based on the testimony that's already been
9 submitted.

10 The second is that the documents must have been made
11 available for examination, copying, or both, by the parties at
12 a reasonable time and place. Also that's the *Bray* second
13 factor.

14 Let me state where I understand the record is at
15 this time. Ms. Christoff advised the Court that counsel for
16 the company had refused them access to the Price Fetch data.
17 Then counsel for Ms. Jones clarified that that was not
18 accurate, that there was no request that was made to access
19 the Price Fetch data, so therefore there was no refusal by the
20 company. So that basis is gone.

21 Mr. Vernia, counsel for Ms. Jones, also confirmed
22 for the Court, as is represented in the document that's been
23 marked as 4002, that the government copied the Ascend/Lawson
24 database and provided it to counsel for the defense, and that
25 counsel for the defense advised the government that it was

1 going to speak with Pilot's counsel about that. The United
2 States didn't hear anything else about it after that time, and
3 assumed that all that was going to be fine until this moment.
4 But that really is another -- is a different issue. What
5 the -- what the record shows through the testimony of
6 Mr. Seay, which is that the data that was extracted from the
7 database has been made available to the parties through the
8 electronic folders that traveled with the letter that is part
9 of Government Exhibit 4001.

10 So this argument has been -- I understand the
11 argument and why it's being made, but I would politely say and
12 respectfully say that it is not a correct argument, it is not
13 accurate, in that the data that underlie the summaries was
14 provided to counsel for the defense. The database from which
15 it was pulled was -- is at Pilot, and it doesn't travel well,
16 given its size and the way it works. And the fact that there
17 is a cooperation obligation pursuant to an agreement reached
18 with the company to resolve this issue really doesn't have
19 anything to do with it. The -- as the Court knows, compulsory
20 process was available.

21 There is one thing I just want to clarify, since
22 there was an impression that could have been made. There was
23 a subpoena that was issued to Pilot by counsel for
24 Mr. Hazelwood, which is what I believe Ms. Christoff was
25 referencing. That subpoena was withdrawn, leading the Court

1 to believe, I assume, that the issue with Pilot was resolved.

2 So at this point there really isn't anything in the
3 record to suggest that Pilot would not be cooperative with the
4 counsel, as far as the government is -- counsel for the
5 defense, as far as the government is concerned. But, again,
6 that's beside the point. The data, the electronic data that
7 underlay the reports, was provided to counsel for the defense
8 when the very lengthy discussion about the nature of his
9 conclusions was provided.

10 Turning to the underlying data must be admissible,
11 there are two categories of data that the United States has
12 provided to the Court, information about -- through this
13 testimony. Yesterday afternoon Mr. Seay testified about data
14 that is created and maintained in the ordinary course of
15 business at Pilot. I believe that the databases that he
16 talked about were the Pilot Ascend database, PMIS database,
17 and possibly another database. But generally within that
18 category there were databases of financial records that Pilot
19 maintains -- creates and maintains in the ordinary course of
20 business, Category 1.

21 Category 2 would be the data that is the PRS data
22 and the OPIS data. The United States made it clear through
23 the examination that that data does come from a third party.
24 But the United States, also through the examination, made it
25 clear that it is in ordinary course of Pilot business to

1 integrate—that's the phrase that Mr. Seay confirmed, "to
2 integrate"—those records into Pilot's business records, and
3 to rely on those in its day-to-day basis.

4 And the reason why that language is important is
5 because it's taken directly from Sixth Circuit precedent,
6 which is *Gerling & Associates, Inc. vs. Gearhouse Broadcast*,
7 625 F. App'x 289 (Sixth Circuit 2015). "A document is
8 admissible under 803(6), even if someone else created that
9 document, so long as a witness testifies that it was
10 integrated into the company records and relied upon in the
11 company's day-to-day operations."

12 At a business like Pilot, and what Mr. Seay
13 explained, it's hard to imagine records from a third party,
14 data from a third party, that's more essential to the
15 day-to-day operation than the OPIS data pulls that Pilot is
16 receiving, as well as the PRS data that tells Pilot how many
17 gallons a customer is purchasing at one of its hundreds of
18 travel plazas around the country on an hourly basis or daily
19 basis or monthly basis. It is very credible that that's the
20 kind -- exactly the kind of data that Pilot would need to rely
21 on in its day-to-day operations. So that satisfies the third
22 element.

23 The fourth element, that the summary document must
24 be accurate and nonprejudicial, I'm not seeing in that element
25 from *Bray* where there is a requirement that there be no

1 opinion in it, but I accept that and can make the argument.
2 The data that is in the summary, the summary provides an
3 accurate summary of that data. Mr. Seay can explain where all
4 of the data in each column came from, the databases that each
5 column is pulled from, and the final column that provides the
6 difference that -- what we're getting at, "the difference"
7 meaning that, say, for example in this case BP Express was
8 promised, we maintain the evidence shows, a cost plus zero
9 discount. We maintain the evidence shows that BP Express was
10 not paid a cost plus zero discount during the time in
11 question. And what this summary, the last column, will show
12 is just math that says that, "Here is the amount that BP was
13 paid during the relevant time for each month, and here is the
14 amount that BP should have been paid for that month," and then
15 it subtracts it. It's just math. And the last column does
16 the math, the difference between the two. And at the very
17 bottom of the summary it totals it all up.

18 So there is nothing prejudicial about it because, to
19 the extent that there is any mathematical error, a calculator
20 could determine it. Although, I believe that I can represent
21 that the mathematical calculations in there are accurate.

22 The United States-- The Court has already heard
23 that the fifth element is clearly satisfied, because Mr. Seay
24 has now, on a couple of occasions in his testimony, explained
25 that he prepared and supervised the preparation of the

1 summaries at issue. The United States really doesn't see
2 any -- any flaw at all in the foundation of these 1006
3 summaries.

4 THE COURT: Is the Court's assumption correct that
5 the servers or the structure which maintains the database and
6 the databases themselves would contain thousands upon thousands
7 of documents and -- well, the data, I guess; some may not be
8 documents -- of business data?

9 MR. HAMILTON: That is a correct assumption.

10 THE COURT: And that they were maintained by Pilot
11 for Pilot's business?

12 MR. HAMILTON: I -- I represent that that's the
13 testimony -- that's what I understand the testimony to be from
14 Mr. Seay.

15 THE COURT: And let's assume that someone, whether an
16 employee of Pilot or someone outside of Pilot, decided that
17 they wanted to either corrupt the data or they wanted to use
18 the databases for some improper purpose, let's say you have
19 some employee that likes child pornography and decides to store
20 child pornography on the databases. Comparing that use with
21 the legitimate business usage by Pilot and Pilot's employees of
22 the databases, how -- what percentage would that improper usage
23 be in comparison with the proper usage?

24 MR. HAMILTON: My expectation, at a company like
25 Pilot, that that would be a percentage that would be hard to

1 register. It would be -- that would be my expectation with
2 respect to your example of child pornography.

3 THE COURT: Or some employee that wants to put false
4 information into the system.

5 MR. HAMILTON: Well, that's a different question in
6 this case, but not as it relates to the data that is at issue
7 here. The United States certainly maintains that the evidence
8 has shown that there were a number of instances where a false
9 discount was inputted into the system to defraud a customer.
10 And it's my understanding that that really is --

11 THE COURT: But in the grand scheme of all the data
12 in the databases, what percentage would that amount be?

13 MR. HAMILTON: Within the -- well, within the entire
14 database?

15 THE COURT: Yes.

16 MR. HAMILTON: I think that that would not be a
17 significant amount in the entire database of material. That
18 was unique to a particular decision on customer discounts.

19 THE COURT: It would be in the nature of the child
20 pornography data.

21 MR. HAMILTON: Well, I don't know that I would say
22 that, but...

23 THE COURT: Well, you would have to assume that a
24 company of any size would have hundreds of employees inputting
25 legitimate information on an hourly, daily, and monthly basis.

1 MR. HAMILTON: Absolutely.

2 THE COURT: And that information is being stored and
3 kept and used by the company. And if some rogue employees
4 wanted to put an awful lot of incorrect information in, then
5 that would become known fairly quickly because the company
6 could not be functioning properly.

7 MR. HAMILTON: Well, it depends on the data. I mean,
8 the United States' position in this case is that there were a
9 number of employees who were inputting false information. And
10 the way in which it was put in, it wasn't -- the way in which
11 it was put into the system, which was one customer's receiving
12 a -- a customer should be getting a cost plus .02, cost plus
13 .04 is put into the system, that doesn't infect -- that does
14 not affect the integrity of Pilot's financial data. What that
15 does --

16 THE COURT: Yeah. I think that's what the Court's
17 question was.

18 MR. HAMILTON: Right.

19 THE COURT: Let's assume that you have an employee
20 who decides that they're going to delete all of the billing
21 information --

22 MR. HAMILTON: Right.

23 THE COURT: -- in a company --

24 MR. HAMILTON: Right.

25 THE COURT: -- so the company does not know who to

1 bill. That would become known pretty quickly, wouldn't it?

2 MR. HAMILTON: That kind of thing would become known,
3 if you're talking about deleting an entire account's billing
4 information.

5 THE COURT: And the same thing about payments, that
6 would become known pretty quickly.

7 MR. HAMILTON: Deleting all of the payments to a
8 particular customer?

9 THE COURT: To all customers.

10 MR. HAMILTON: To all -- if you deleted all the
11 payments to customers, that is definitely the kind of thing
12 that would seem to me that Pilot -- a company like Pilot would
13 catch something like that.

14 THE COURT: Well, if the company is operating in a
15 normal manner, you have employees log into the system and use
16 the information in the system all the time.

17 MR. HAMILTON: I'm sorry, I didn't understand the
18 question.

19 THE COURT: In a properly operating company, you'll
20 have employees logging into the databases all the time.

21 MR. HAMILTON: Yes, sir.

22 THE COURT: And they can compare what they're
23 receiving with what they received the last time they logged in.
24 If something radically changes, they're going to notify
25 somebody.

1 MR. HAMILTON: I would say that if a user is going to
2 the same database over and over again in the ordinary course of
3 business, and that user was relying on that data to be there
4 the next time the user came back, and it either wasn't there or
5 it was materially different in a way that affected the
6 business, then, yes, that user would pick up on that, assuming
7 that the user was not the one who had done it, right? So...

8 THE COURT: And that's why companies have computers,
9 so the employees can rely upon what's in the databases and what
10 to use. That's how they function.

11 MR. HAMILTON: That's how they're supposed to
12 function, yes, Your Honor. I'm careful to say this, because of
13 the nature of what actually happened at Pilot in the direct
14 sales division.

15 THE COURT: Well, in this case you have -- I think
16 someone said there were 22,000 employees, 25,000 employees?

17 MR. HAMILTON: There's been testimony that there are
18 27,000 employees.

19 THE COURT: Twenty-seven [sic] employees. And my
20 thought is that-- Let's see, 10 percent would be 2700,
21 1 percent would be 270 people. My guess would be you had fewer
22 than 1 percent involved in putting improper information in the
23 computer system, by the government's estimate.

24 MR. HAMILTON: I believe there are fewer than 270
25 people involved in the alleged fraud.

1 THE COURT: So that's less than 1 percent, then,
2 right?

3 MR. HAMILTON: Yes, sir.

4 THE COURT: That's a small number, isn't it?

5 MR. HAMILTON: Yes, sir.

6 THE COURT: Okay. If you have a significant number
7 of people putting bad data in the system, the system's not
8 going to function. The system's like --

9 MR. HAMILTON: Well, the --

10 THE COURT: -- a human body. We can function with
11 diseases. When the diseases take over the body, we don't
12 function anymore.

13 MR. HAMILTON: I agree with that. And...

14 THE COURT: And as long as the system is functioning,
15 that means that the information is substantially reliable.

16 MR. HAMILTON: Well, and I -- if I could also add,
17 Your Honor, which is that -- from the government's perspective,
18 we are talking about apples and oranges, which is that -- the
19 oranges being the data that is being pulled to recalculate
20 discounts that should be owed, it was coming from invoices that
21 were sent to customers and financial -- other financial records
22 in Pilot, OPIS data, gallons that were purchased by customers,
23 that -- that's a data set that's entirely different from the
24 customer discount that was promised to the customer. So that's
25 not what the database is about. The database is to be able to

1 determine what actually was paid to a customer and then to
2 determine what discount was promised to the customer and to
3 make sure that those line up.

4 So the fraud that the United States has alleged to
5 have occurred, which is falsely representing discounts to
6 customers, would not affect the underlying database. Those
7 were misrepresentations that were made to the customer, and
8 they caused, in the -- according -- in our view of the
9 evidence, fraudulently reduced rebates or fraudulently
10 calculated invoices to go out. But the United States doesn't
11 see that as affecting the integrity of the underlying data to
12 recalculate payments. So that-- Thank you for considering
13 that argument.

14 THE COURT: The last argument.

15 MR. VERNIA: Your Honor, I -- I, first of all, would
16 like to object for the record. I think there was a lot of
17 essentially testimony from Mr. Hamilton. I don't believe that
18 he was intending to do it, but I think he was saying what the
19 government's view of the evidence was, and I think that it is
20 improper at this time for that to be in the record.

21 I did want to raise with the Court -- we had
22 discussed the possibility of a subpoena. And for the sake of
23 this issue and for the sake of possible future uses of
24 subpoenas in this action, I can tell you that on behalf of
25 Ms. Jones we've been guided by this Court's decision in

1 Al-Amin. And it is our understanding that this Court, under
2 Rule 17(c), would not have approved the early return of this
3 evidence because it would not necessarily have been
4 admissible, and that actually the admissibility of the
5 evidence is something we're working as to right this very
6 moment. So -- and had it been returned early, it would have
7 been maintained by the Court and not -- would not have been
8 really available in the way that Rule 1006 speaks of.

9 THE COURT: Do you have a copy of Rule 106 [sic] in
10 front of you?

11 MR. VERNIA: Of 106, or 1006, Judge?

12 THE COURT: I'm sorry, I keep saying 106. 1006.
13 Thank you. Read out loud the last sentence in Rule 106 [sic].

14 MR. VERNIA: "The court may order the proponent to
15 produce them in court," sir.

16 THE COURT: So assuming that the request was made
17 pursuant to Rule 106 [sic], is there any reason why the Court
18 would not have followed Rule 106 [sic] -- I'm sorry, I keep
19 saying 106 -- 1006?

20 MR. VERNIA: No, sir. I believe you would have
21 followed the rule.

22 THE COURT: Okay.

23 MR. VERNIA: And, if necessary, we make the request
24 that the documents we're speaking of, the Price Fetch database
25 and the queries, actually be produced to the Court. Thank you.

1 MS. CHRISTOFF: Your Honor, if I may just briefly
2 read into the record the language from the criminal enforcement
3 agreement between --

4 MR. HAMILTON: Whoa, whoa. May I -- may I object
5 before this is done? I mean, this is -- the criminal
6 enforcement agreement is a document that is not in evidence at
7 this time. I'm not sure that it's appropriate for that, but...

8 MS. CHRISTOFF: Well, Your Honor, again, this is a
9 question of admissibility. So, under Rule 104(a), the Court is
10 not bound by the rules of evidence. This goes directly to the
11 Court's questions about the government's control over the
12 evidence that we're talking about.

13 THE COURT: Well, pointing the opponents to where the
14 originals or the underlying records were.

15 MS. CHRISTOFF: I'm sorry, Your Honor?

16 THE COURT: Is there any objection to whatever she
17 wants to read being read in open court, or would you like her
18 to just provide it to the Court?

19 MR. HAMILTON: Not knowing what it is that she is
20 about to read from the criminal enforcement agreement, I would
21 prefer that it be presented to the Court. I --

22 THE COURT: Ms. Lewis, could you retrieve it?

23 THE COURTROOM DEPUTY: Yes, Your Honor.

24 MS. CHRISTOFF: We can just do an in camera
25 submission, perhaps, Your Honor, or read it into the record

1 after the jury is dismissed for the day.

2 THE COURT: We can do that. We can do that. With
3 the reservation of this material that Ms. Christoff would like
4 to present to the Court, the Court makes a ruling pursuant to
5 Rule 1006 that the appropriate foundation has been provided.

6 We're talking about electronic records stored on a
7 business database. The business is huge. The witness has
8 testified that this database is occupied by employees'
9 inputting information on it. And he used some tools and
10 software to pull data from these databases to prepare the
11 summaries that he will testify from today. So the Court makes
12 a finding that an adequate foundation has been laid pursuant
13 to Rule 1006.

14 Proceed, Counsel.

15 DIRECT EXAMINATION (Continuing)

16 BY MR. HAMILTON:

17 Q Let's go to--

18 May we go to the government's laptop, please. So
19 we'll look first at Government Exhibit 810A. And let's pull
20 up just the document first, before we go to the excerpt that
21 we're going to take a look at.

22 And you can look at it in your binder. So can you
23 see on your screen Government Exhibit 810A?

24 A Yes.

25 Q And do you see some initials there?

1 A Yes.

2 Q And what are those initials?

3 A Those are my initials.

4 Q Okay. Would you just read the letters, just --

5 A I'm sorry. "DMS."

6 Q Those are your initials?

7 A Yes.

8 Q Okay. So looking at the heading of this document,
9 can you read that to the jury.

10 A "BP Express, Inc., Summary."

11 THE COURTROOM DEPUTY: Mr. Hamilton, do you want this
12 to the jury, or no?

13 MR. HAMILTON: Yes. Thank you. Thank you.

14 BY MR. HAMILTON:

15 Q All right. So this is 810A that is now displayed to
16 the entire courtroom. And would you read the top portion of
17 the document.

18 A It's "BP Express, Inc., Summary."

19 Q And just read the entire heading.

20 A Okay. "Comparison: Rebate paid vs. cost plus zero.
21 Period: January 1st, 2009, through October 31st, 2012. Total
22 Difference: \$218,463.46."

23 Q So tell us what that means, what this summary is
24 providing.

25 A Okay. This is a customer discount comparison

1 summary. The comparison identified is a comparison between
2 the original rebate amount that was paid to a customer, BP
3 Express in this case, and then it compares the original rebate
4 amount paid to what that rebate would have been had cost plus
5 zero been applied, or if -- you know, if we were to apply cost
6 plus zero to their customer fuel volume, what that discount
7 would have been.

8 Q During a particular time?

9 A Yes, during the period identified between January
10 2009 and October 2012.

11 Q And then the last line, the total difference?

12 A The "Total Difference" amount reflects the
13 difference between the original rebate amount that had been
14 paid versus what that rebate would have been based on a
15 discount of cost plus zero. That can also be referenced as
16 the subtotal of the "Difference" column in the body of the
17 exhibit.

18 Q All right. We're going to look at, I believe, five
19 other exhibits, and do they all have headings like this?

20 A Yes. The headings are very similar. Obviously
21 there will be differences, being the customer, the discount
22 applied, and the dates. But, yes, they would be --

23 Q The nature of the information, the heading, the
24 information contained continue to be the same?

25 A Yes.

1 Q All right. Let's walk through the columns. So what
2 does the first -- the first column tell us?

3 A That's "Month," so that would be the month in which the
4 fuel payments were purchased or the fuel purchases occurred at
5 our retail locations, which the rebate was based.

6 Q And how about the "Payment Number"?

7 A "Payment Number" is the payment ID from our
8 financial system.

9 Q How about the "Payment Method"?

10 A "Payment Method" would indicate how the payment was
11 made, either check or ACH, also obtained from the financial
12 system.

13 Q And the "Date" column?

14 A The "Date" would be the date of payment.

15 Q And how about the "Rebate Amount Paid"?

16 A "Rebate Amount Paid" would agree with the actual
17 payment made, so the check amount or ACH amount sent to the
18 customer.

19 Q And the "Rebate Amount If Cost Plus Zero Used"?

20 A That comes from the manual rebate Power Pivot tool
21 calculation to determine what a rebate would have been based
22 on cost plus zero and the customer's fuel volume.

23 Q And then the "Difference" volume?

24 A The "Difference" column represents the difference
25 between the "Rebate Amount Paid" column and the "Rebate Amount

1 If Cost Plus Zero Used" column.

2 Q All right. Is that done on a monthly basis in this
3 summary?

4 A Yes.

5 Q And is that -- are all the summaries done providing
6 information on a monthly basis?

7 A Yes.

8 Q With the exception of 727 for Queen?

9 A Correct. That's -- yeah, that was an off-invoice
10 customer, so that one was created a little differently for the
11 period.

12 Q All right. We'll get to that. I just didn't want
13 to make my effort to move things along too broad in its reach.
14 So let's go to the bottom of this document. And do we see the
15 "Grand Total" here at the bottom?

16 A Yes.

17 Q And can we look at the -- I think we have a document
18 where we could look at an excerpt at the bottom and the top at
19 the same time. Are we looking at the bottom and the top of
20 this document at the same time?

21 A Yes.

22 Q So what's the total rebate amount paid?

23 A The initial rebate amount paid was \$1,015,165.05.

24 Q And if cost plus zero had been used during the time
25 in question, how much would have been paid?

1 A That amount would have been \$1,233,628.51.

2 Q And the difference there?

3 A The difference between those two numbers was
4 \$218,463.46.

5 Q Let's go to our next exhibit, and that is Government
6 Exhibit 1522A. And is this -- is this summary oriented in the
7 same way or presents its information in the same way as the
8 one we just looked at for BP Express?

9 A Yes.

10 Q Let's look at-- We have an excerpt of this. What
11 we now have on the screen, do we not, is the top part of 1522A
12 and the bottom part of 1522A?

13 A Correct.

14 Q All right. Would you tell the jury what is being --
15 what the cost comparison is for JTL Carriers in this summary?

16 A The comparison itself?

17 Q Yes. What is the cost plus comparison that's going
18 on here?

19 A It's doing a similar comparison versus -- the rebate
20 amount that was originally paid versus what that rebate amount
21 would have been based on a discount of cost plus .02.

22 Q And what is the -- what's the time period in
23 question?

24 A Time period is May 1st of 2008 through January 31st
25 of 2012.

1 Q And what's the -- what's the total difference that
2 would have been paid to this customer if a cost plus .02 had
3 been actually applied during that time?

4 A \$119,222.01.

5 Q Go to the next document, which is Government
6 Exhibit 1613A. And let's zoom on -- zoom in on this one. And
7 what is this document?

8 A This is a customer discount comparison for
9 Amerifreight Systems.

10 Q And what is the cost minus discount that's being
11 used for the comparison?

12 A The cost minus discount would be cost minus .03.

13 Q And what -- again, what's the comparison that's
14 being made here?

15 A That's the original rebate amount that was paid for
16 this customer versus what that original rebate would have been
17 had cost minus .03 been applied.

18 Q And in this instance what is the time period?

19 A This time period is February 1st, 2011, through
20 February 28, 2011.

21 Q And what's the -- what was the total difference
22 stated on the summary?

23 A \$7,041.97.

24 Q Please direct your attention now to Government
25 Exhibit 1712A. And is this summary oriented and presented in

1 the same way as the other summaries we've looked at?

2 A Yes.

3 Q And what -- what summary is -- what customer relates
4 to this summary?

5 A This is Halvor Lines.

6 Q And what is the cost minus discount that is in use
7 here?

8 A We're applying -- we're comparing the original
9 rebate amount paid versus cost minus .05.

10 Q During what time period?

11 A June 1st, 2011, through April 30th, 2012.

12 Q And what is the total difference there?

13 A \$131,188.42.

14 Q Now, let me direct your attention to Government
15 Exhibit 1826A. And what is 1826A?

16 A The customer discount comparison for Ryder Truck
17 Rental.

18 Q And what is the cost plus discount that's used for
19 the comparison here?

20 A Cost plus .05.

21 Q And what's the time period?

22 A This is for September 1st, 2012, through
23 October 31st, 2012.

24 Q And what was the difference determined to be?

25 A \$82,236.77.

1 Q Please direct your attention now to Government
2 Exhibit 727A. And what is this summary?

3 A This is a customer discount comparison for the
4 off-invoice customer Queen Transportation.

5 Q And in this summary is there a column that is
6 different from the columns that we were just looking at
7 before?

8 A Yes.

9 Q Okay.

10 And can we zoom in on that, please?

11 And what column is that?

12 A In this case the customer was an off-invoice
13 customer, so the discount was applied to reduce their invoiced
14 amount, so the first three columns are named a little
15 differently. So in this case, the first column is "Invoice
16 Date," and that would be the date of the invoice.

17 Q All right. And what is the second column?

18 A "Invoice Number."

19 Q And how about the -- what's the invoice amount?

20 A That would be the amount of -- the invoice amount
21 would be the amount of the customer invoice, the original
22 invoice the customer was sent.

23 Q And what is the column "Invoice Amount if Cost Plus
24 .03 Used"? What does that mean?

25 A That would be the invoiced amount the customer would

1 have been sent had they originally applied a cost plus .03
2 discount.

3 Q And the "Difference" column?

4 A The "Difference" is the difference between the
5 original invoiced amount and the invoiced amount "If Cost Plus
6 .03 Used" column.

7 Q All right. And with the other exhibits we were
8 looking at, the recalculation was done on what time increment?

9 A Monthly.

10 Q And here is it driven by the date of the invoice?

11 A Yes.

12 Q And how frequently was this customer being invoiced?

13 A This customer was being invoiced five days a week.

14 Q And how many pages is this? This is a little
15 different, so I just want to point it out. How many pages is
16 this summary?

17 A Twelve pages.

18 Q And what time period is covered?

19 A January 16th, 2010, through April 15th, 2012.

20 Q Would you look at that last date again.

21 A Oh, I'm sorry. November 15th, 2012.

22 Q So it wasn't April 15th. It was --

23 A November. Excuse me.

24 Q And what is the total difference on there?

25 A \$60,656.64.

1 Q And the invoice e-mail address, where is -- that was
2 something that came up during the first part of your
3 testimony, and I believe that counsel pointed out a
4 declaration from a John Lowery about the source of that
5 information.

6 United States-- It's been referenced. United
7 States would like to, just to make sure we have a complete
8 record, put that declaration into evidence as a certification
9 of the business record -- certification relating to the
10 business record of the source of the e-mail information as
11 Government Exhibit 3503.

12 MS. CHRISTOFF: Objection. Hearsay, Your Honor.

13 THE COURT: Mr. Hamilton?

14 MR. HAMILTON: 902(11)-- Excuse me. I knew it was
15 902. I just couldn't remember what subsection. It's 902(11),
16 "Certification of a domestic record of a regularly conducted
17 business activity." That's why the United States is submitting
18 it pursuant to Rule 902(11). The United States gave notice to
19 defense counsel that it would use this.

20 I also advise the court that Mr. Lowery is
21 available. I'm just trying to move things along. We can make
22 him available to -- to provide additional information about
23 the foundation for the invoice e-mail if counsel is unwilling
24 to accept the declaration pursuant to 902(11), which is
25 their -- they can make that -- they can take that position if

1 they'd like, but we're just trying to avoid having to call
2 Mr. Lowery for that.

3 THE COURT: Counsel?

4 MS. CHRISTOFF: One moment, please, Your Honor.
5 Sorry. Your Honor, I believe that the declaration itself would
6 not be evidence. It may be authority for the records to come
7 in.

8 MR. HAMILTON: Your Honor, that is -- the United
9 States does not need to submit it as evidence. We're only
10 submitting it for a Rule 104 foundation basis.

11 THE COURT: I think, then, that the opponent accepts
12 that, and has no objection to the admission of the underlying
13 document, then.

14 MR. HAMILTON: We'll just mark -- we'll mark this
15 declaration, 3503, as a document for identification only, but I
16 would like, since I did offer it for the -- if I may ask the
17 Court to confirm that the parties do not require the government
18 to bring Mr. Lowery in here to testify about that purely for a
19 *Crawford* issue. That's all.

20 THE COURT: When counsel indicates that there's no
21 necessity to file the certificate itself, that means that the
22 certificate is accepted by counsel and also there is no
23 objection to the underlying document being introduced. And I
24 think you can infer from that there's agreement that the
25 document itself qualifies for admission pursuant to

1 Rule 803(6)(A)(C).

2 MR. HAMILTON: Yes, sir.

3 THE COURT: So I don't think there is a need for the
4 Court to make a finding or for the opponent to say anything
5 further.

6 MR. HAMILTON: Yes, sir.

7 BY MR. HAMILTON:

8 Q The "Invoice E-mail Address," what is the "Invoice
9 E-mail Address"?

10 A In this case, the "Invoice E-mail Address" would
11 indicate the e-mail addresses that received the invoices.

12 Q And what are those e-mail addresses?

13 A Dqueen@queentransportation.com and
14 mqueen@queentransportation.com.

15 Q And would that be the way in which this customer
16 received its invoice?

17 A Yes.

18 Q Electronically?

19 A Correct.

20 Q By e-mail?

21 A Yes.

22 Q All right. Are you familiar with -- we're now going
23 to shift gears from the cost plus comparison summaries and
24 move to a different topic, which is Pilot customers -- Pilot
25 customer P&Ls. Are you familiar with Pilot customer P&Ls?

1 A Yes.

2 Q And what are those?

3 A They're the -- P&Ls are the profit and loss
4 statements that would reflect -- that our sales department
5 used to identify customer volume and any profit and loss by
6 month.

7 Q And how are you familiar with them?

8 A So we became -- we used them during the audit and
9 then also subsequent to the audit. As of January 2015
10 forward, my current team is responsible for producing both the
11 P&Ls.

12 Q In your current position, your team has
13 responsibility for that?

14 A Correct. We have taken over the reporting for all
15 of our sales' profit and loss statements.

16 Q And are Pilot customers' profit and loss statements
17 documents that are made, kept, and maintained in the ordinary
18 course of business at Pilot?

19 A Yes.

20 Q Will you direct your attention to Government
21 Exhibit -- and this is before I display it to the jury --
22 810C, 1522C, 1613C, 1712C, 1826C, and 727B. Do you see those?

23 A I do.

24 Q And what -- did you prepare those documents?

25 A I did.

1 Q What are those documents?

2 A Those are the documents containing summary
3 information from the customer P&L statements.

4 Q And do those, the summaries for the exhibit numbers
5 that I just listed, contain information that is exclusively
6 from profit and loss statements listed on them?

7 A Yes.

8 MS. CHRISTOFF: Your Honor, I don't know if
9 Mr. Hamilton is finished laying the foundation, but I do have
10 objection to these documents as well.

11 THE COURT: An objection again on hearsay?

12 MR. HAMILTON: I haven't completed my foundation. I
13 think I have one more question I need to ask. That's why I was
14 checking. If I may.

15 BY MR. HAMILTON:

16 Q Did those summaries accurately summarize the data
17 from the -- not data, but did those summaries accurately
18 summarize the profit and loss statements that are being
19 summarized?

20 A Yes.

21 MR. HAMILTON: I believe I've now completed the
22 foundation required for Rule 1006.

23 THE COURT: Objection?

24 MS. CHRISTOFF: Objection under Rule 1006 and as
25 hearsay, Your Honor.

1 MR. HAMILTON: May I respond, Your Honor?

2 THE COURT: You may.

3 MR. HAMILTON: All right. So the first thing we
4 established was that the underlying documents were admissible
5 by establishing that they are Pilot business records. These
6 documents are made by Pilot in Pilot's regular course of
7 business, and they are kept by Pilot in the regular course of
8 business. They satisfy 803(6). And the-- What was the other
9 argument? I'm sorry.

10 THE COURT: 1006, and also not a business record,
11 hearsay.

12 MR. HAMILTON: Oh, the hearsay response, I just made
13 the hearsay response by referring to 803(6). So they are a
14 hearsay exception --

15 THE COURT: So 1006, then, would be --

16 MR. HAMILTON: Excuse me. So the 1006 is, they are--
17 I do need to ask the witness one more question—I just realized
18 that, I'm sorry—to make a foundation.

19 BY MR. HAMILTON:

20 Q Mr. Seay, are the records that are summarized
21 voluminous in nature?

22 A Yes.

23 Q Would that be convenient to bring into court?

24 A No.

25 Q And does the way in which they're summarized make it

1 easier for the jury to understand the data that's being
2 summarized?

3 A Yes.

4 MR. HAMILTON: All right. I'm ready to make my
5 Rule 1006 argument, Your Honor, if I may.

6 MR. VERNIA: Your Honor, if I may make a separate
7 objection to 1522C. My understanding is that not all the JTL
8 profit and loss statements were existing, that some had to be
9 recreated, and we would object to the entry of this document on
10 the grounds that it was from recreated records rather than
11 contemporary business records.

12 THE COURT: Excuse me.

13 Ladies and gentlemen, counsel are making arguments
14 now, and I think the arguments are going to go on for a few
15 minutes. It's almost 5:00. And I have not checked the
16 weather recently, but I was informed around lunchtime that
17 there is a threat of snow north of here and also west of here.
18 And I know some of you have some driving to do. There is no
19 snow predicted for Chattanooga, but I think to be on the safe
20 side we probably should let you get on the road as quickly as
21 we can. So we're going to quit now.

22 I was mulling over having court on Tuesday this
23 week, but the weather report for Tuesday is, it's going to get
24 up to the high of 29 degrees and we should have some flurries
25 and snow. That may or may not be accurate, but I don't think

1 it makes any sense to have you try to come back, even with
2 that risk.

3 So we'll start again on next Wednesday, and that's
4 predicted to be a sunny day. Again, it will be cold, it will
5 also be 29 degrees, but they show zero percent chance of
6 precipitation, so it should be safe. So we'll reconvene next
7 Wednesday. Monday is a holiday. Tuesday, because of the
8 weather, we're not going to have court. So we'll resume on
9 Wednesday. Okay.

10 So the jury is excused. Remember my earlier
11 admonitions regarding allowing anyone to talk to you about the
12 case, watching anything on television, listening to anything
13 on the radio, reading anything in the newspapers or on the
14 Internet about this case. So we'll see you next week.

15 (The jury exited the courtroom, and the proceedings
16 continued as follows:)

17 THE COURT: You may be seated.

18 MR. HAMILTON: May I continue?

19 THE COURT: Let's wait for Ms. Lewis to get back.

20 MR. HAMILTON: Oh, sure.

21 THE COURT: She maintains the record in the
22 courtroom.

23 (Brief pause.)

24 THE COURT: You may now.

25 MR. HAMILTON: All right. Let me deal with -- if I

1 may. So the Court asked me to make an argument -- I was making
2 a Rule -- about to make a Rule 1006 argument, and then counsel
3 for Ms. Jones made a specific argument about Exhibit 1522C,
4 which I think in my mind can be easily addressed and should be
5 addressed first and then go back to Rule 1006, if I may.

6 So counsel for Ms. Jones said that 1522C should not
7 be admitted because there are profit and loss statements upon
8 which that is based that had to be recreated, and I would like
9 to make a record of the fact that I do not believe that that
10 is accurate. I believe that the P&Ls that are referenced in
11 JTL Carriers' profit and loss statement summary were in
12 existence already, were not recreated by Mr. Seay. May I make
13 a record of that, Your Honor?

14 THE COURT: You may.

15 BY MR. HAMILTON:

16 Q Mr. Seay, turning to 1522C. Do you have that in
17 your binder?

18 A I do.

19 Q And what period of time is covered?

20 A January 1st of 2010 through January 31st of 2012.

21 Q And is that for a period of time in which you were
22 able to locate JTL P&L records?

23 A Yes. Restricted P&Ls were systematic starting in
24 January 2010 forward. So, yes.

25 Q Was there an earlier draft of the summary that was

1 subject to some litigation that -- in which there were P&Ls
2 that you did -- or profit and loss statements that you did
3 recreate to cover a wider period?

4 A Yes.

5 Q All right. And is that what this summary is?

6 A No.

7 Q Is this a summary that is based only upon P&Ls that
8 existed upon which you are -- upon which the summary is based?

9 A Yes.

10 Q Just so I'm clear, did you make up -- did you create
11 any of the summaries upon which 1522C is based?

12 A No.

13 MR. HAMILTON: Now let me turn to the Rule 1006
14 argument. And of course, as Ms. Christoff has pointed out, the
15 leading case on that, or the controlling case in the Sixth
16 Circuit, is *United States vs. Bray*. The first requirement is
17 that the documents must be so voluminous that they cannot be
18 easily examined in court, and Mr. Seay has stated that on the
19 record.

20 The second is that the government, the proponent,
21 must have made the documents available for examination, for
22 copying, or both. These P&L statements have been produced in
23 discovery to the defendants.

24 Third, the proponent must establish that the
25 underlying documents are admissible in evidence. The United

1 States has established that these documents are admissible
2 under 803(6) as business records of Pilot.

3 And the -- and fourth, the summary document must be
4 accurate and nonprejudicial. Mr. Seay has stated on the
5 record that the summaries accurately summarize the underlying
6 profit and loss statements.

7 And Mr. Seay has satisfied -- Mr. Seay's testimony
8 has satisfied the fifth requirement of *Bray*; that is, the
9 proponent should present the testimony of the witness who
10 supervised its preparation. And Mr. Seay has -- has testified
11 that he satisfies that requirement as well. So the United
12 States has satisfied all five requirements for *United States*
13 *vs. Bray* for the profit and loss summaries.

14 THE COURT: Any reply?

15 MS. CHRISTOFF: Your Honor, my arguments as to most
16 of the elements under Rule 1006 are the same. And the Court
17 has previously ruled. So I would like to just preserve that
18 objection.

19 However, there -- I do have a specific argument as
20 to the trustworthiness of these documents under Rule 803(6)(E)
21 that I would like to voir dire the witness on.

22 THE COURT: Very well.

23 VOIR DIRE EXAMINATION

24 BY MS. CHRISTOFF:

25 Q Hello again, Mr. Seay.

1 A Uh-huh.

2 Q So you've testified that the profit numbers on these
3 summaries come from the P&L statements produced at -- out of
4 the direct sales group. Is that correct?

5 A Correct.

6 Q And you had to -- but you had to do a little bit of
7 work on those numbers to get the profits where you were
8 comfortable with them. Isn't that right?

9 A For this exercise, no. This is strictly entering
10 information from the source customer P&Ls that were reports of
11 record onto these summaries. You're referring to the previous
12 separate exercise that we did.

13 Q Okay. So the-- All right. Sorry. Give me one
14 second. But you are aware that there were mistakes in the
15 P&Ls, correct?

16 A In the case of these P&Ls, I was aware there are
17 months that the rebates were not reflected on these P&Ls. The
18 exercise that I performed was to summarize the gallons and
19 profit and loss that were reported for our sales department,
20 so it was strictly an exercise of taking what was on the sales
21 customer P&L and summarizing it here.

22 Q Right. So I understand that you took the number
23 from the P&L --

24 A Uh-huh.

25 Q -- and summarized it here. But I believe you just

1 testified that you're aware of mistakes in the documents that
2 you're pulling the numbers from, correct?

3 A Yes. But if you were -- but the -- how these
4 reports were utilized, I believe they were in the -- the basis
5 for commissions and other exercises for the sales team, so
6 they would have -- this is a reflection of what they had used.

7 Q So they do not accurately reflect the profits
8 attributable to the customers?

9 A I think there were a few customers and a few periods
10 where the -- that was not included.

11 Q So the P&Ls were inaccurate, correct --

12 A Um --

13 Q -- in those instances?

14 A -- from an accounting perspective, yes. But from
15 what the sales department was relying upon as the basis for
16 their profitability, that's -- you know, depends on the user.

17 Q Well, the way that the sales department relied on
18 them to determine their profitability isn't the same thing as
19 their actual profitability, correct?

20 A In the cases where there were missing rebates, yes,
21 that's correct.

22 Q And are you aware of other times that the employees
23 in the sales department had difficulty relying on the P&Ls?

24 A Prior to the 2010, when the restricted P&Ls were
25 being created manually by the sales team, I believe those were

1 unreliable, which is -- but they're not included in the
2 summaries.

3 Q Only prior to 2010?

4 A To my knowledge, yes.

5 MS. CHRISTOFF: Can I have the Elmo, please.

6 BY MS. CHRISTOFF:

7 Q Do you know who Vicki Borden is?

8 A Yes.

9 Q Who is she?

10 A She's the director of our wholesale and inside sales
11 team.

12 Q Are you aware that she was primarily responsible for
13 creating the P&Ls for the direct sales team?

14 A No -- well, the P&Ls I'm aware of came out of our IT
15 systems, but she may have produced and summarized them maybe.

16 Q So you don't know who created the P&Ls?

17 A Yes. It's a systematic process that pulls the data
18 from our source databases.

19 Q So, as far as you know, the P&Ls that the direct
20 sales team relied on came only from IT?

21 A I believe so.

22 Q And what's the date of this e-mail?

23 A August of 2010.

24 Q And do you see where Ms. Borden is e-mailing the
25 direct sales team, "Mark and I had a discussion about

1 commissions to be paid this month. The P&Ls are iffy as to
2 whether they are correct, and the restricted basis are not
3 correct. Many other factors are not proofed."

4 A So what they're referring to there is, the
5 "restricted basis," I'm assuming that's for restricted based
6 gallons. That was not included in the summarizations we
7 provided. That is also not a determination of profitability.

8 Q And "many other factors were not proofed," she said
9 as well, right?

10 A I can't attest to what factors those would be. But
11 the restricted basis referred to here would not be an
12 indicator of profitability.

13 Q And she says, "The P&Ls are iffy," right?

14 A She could be referring to the restricted base
15 gallons that you're discussing here. I don't know what she is
16 referring to as "iffy," so...

17 Q You don't know, do you?

18 A I-- You'd have to ask her.

19 Q Well, you're the person to ask, so I'm asking you.

20 A Well, if she is calling out the restricted base
21 volume, that, again, is input volume from the sales department
22 that would not impact profitability.

23 Q If she is. But you don't know.

24 A No. She says "iffy," and there is no clarification.

25 Q And that was in 2010, right?

1 A Yes.

2 Q And here we have an e-mail from Heather Jones to
3 Vicki Borden where she asks about Brian's commission as seen
4 on his restricted P&L?

5 A Uh-huh.

6 Q And Ms. Borden responds, "I think Lori had input
7 Brian's wrong last month"?

8 A That is probably referring to commissions.

9 Q Well, Ms. Jones is asking about what was seen on the
10 P&L, right?

11 A Again, I don't know if it's basis gallons or -- I
12 don't know what -- the input she's referring to, so I can't
13 attest to that.

14 Q Right. You don't know, do you?

15 A I can't comment as to the validity of -- of what
16 this is, because she's not clear on what they're inputting.
17 I'm assuming-- Now, the way they calculate commissions is a
18 spreadsheet external of the customer P&Ls. If she's referring
19 to, "I think Lori input Brian's wrong last month," I would
20 read that as the commissions spreadsheet, not the customer
21 P&L.

22 Q Well, clearly it impacted the P&L, right?

23 A No. Apparently it impacted Brian's commissions.

24 Q Commissions as seen on his P&L, shows up on the P&L.

25 A Oh, well, commissions, again, that's-- Commissions

1 is a calculation on the restricted P&L; it's not a signifier
2 of profit. So I'd have the look at the P&L in question,
3 their -- because the way the restricted P&L works, it would
4 show customer volume, it would also show the company's
5 profits. So when you refer to profitability, that's the stuff
6 we're relying on. There are subsequent calculations based on
7 their base volume and their commissions, the percentage -- or
8 the cents per gallon, or gallon basis, or -- that they receive
9 on commissions, to calculate the sales rep's commissions. In
10 that case, again, that is not company profitability, that is
11 commissions calculation.

12 So anything between the profitability now that we're
13 showing for Pilot Flying J, which is represented here, and
14 that commissions amount, if there was anything flawed with the
15 base gallons or the commission calculation, that's nothing I'm
16 discussing here. That is a manual input from the sales team.
17 That would not impact profitability of Pilot Flying J.

18 Q Well, you're speculating as to what she's referring
19 to, right?

20 A That's how I read this, yes.

21 Q And fundamentally you don't know because you weren't
22 involved with the preparation of the P&Ls for the direct sales
23 team at the time, right?

24 A I'm familiar with how the data -- the data behind
25 the customer P&Ls is calculated -- were calculated, yes, and I

1 know where they pulled the profitability numbers and the
2 customer discount information, so -- but as for the input on
3 the commissions components, no. I'm aware of how they did it,
4 but we didn't -- we never audited that because, again, it
5 never related to the profitability of Pilot.

6 Q So, again, the answer is, no, you don't know because
7 you weren't involved, right?

8 A The commissions portion, no. I was not involved in
9 the commissions portion of the P&L.

10 Q And you don't know that Vicki Borden was the one
11 that prepared the P&Ls?

12 A No. I mean, if she inputted data for the P&Ls,
13 but...

14 Q She did input data for the P&Ls?

15 A I don't know. I said she may been, so...

16 Q You don't know. Okay.

17 A And it would have been, again, for the commissions
18 components, the basis gallons and the commissions, and not
19 necessarily for the customer profitability components.

20 MS. CHRISTOFF: Thank you.

21 THE WITNESS: Uh-huh.

22 MS. CHRISTOFF: Your Honor, I believe we've just
23 established that the witness does not know how the documents
24 were prepared and he cannot comment on the individual
25 responsible for the documents, calling the documents themselves

1 into question. These documents are inherently unreliable and
2 untrustworthy. These are, in fact, some of the documents that
3 were altered that are the subject of this case, and therefore
4 they cannot constitute -- they cannot fall under the business
5 records exception under 803(6)(E), which allows the Court to
6 deny the exception if the documents have a -- do not have a --
7 they have a lack of trustworthiness.

8 THE COURT: The e-mails that you just used with this
9 witness to demonstrate the potential unreliability of the
10 documents, were they the same documents that were used -- I
11 believe it was either yesterday or day before yesterday there
12 was an objection based on hearsay, and the Court was informed
13 that the documents were not being offered for the truthfulness
14 of the matter asserted?

15 MS. CHRISTOFF: Yes, Your Honor. In this case I am
16 offering them for the truth of the matter asserted, in order to
17 determine this foundational issue of admissibility under
18 803(6), so that the Court is not bound by the hearsay rule.

19 THE COURT: Has this witness identified them to
20 permit them to be introduced?

21 MS. CHRISTOFF: I'm sorry?

22 THE COURT: What witness has identified those
23 exhibits sufficiently to allow them to be introduced as
24 evidence?

25 MS. CHRISTOFF: Your Honor, I apologize, I do not

1 intend to introduce them as evidence.

2 THE COURT: Okay. So --

3 MS. CHRISTOFF: They're to aid the court in its
4 determination.

5 THE COURT: -- the only reason they've been in court
6 thus far is because the Court was assured that they were not
7 being offered for the truthfulness of the matter asserted.

8 MS. CHRISTOFF: Yes, Your Honor.

9 THE COURT: Okay. Do you think the Court was
10 entitled to rely upon that representation?

11 MS. CHRISTOFF: Yes, Your Honor. I'm using them for
12 a different purpose.

13 THE COURT: So if the Court relies upon that
14 representation, then the Court should assume that everything in
15 the document is not true. Is that right?

16 MS. CHRISTOFF: As to Ms. Whaley's testimony, yes,
17 Your Honor, but not for this purpose.

18 THE COURT: The only reason they're before the Court
19 is because of the representation someone made to me and in open
20 court. They're not before the Court for any other reason.
21 This witness has not identified the document or authenticated
22 the document. So the Court has no way of concluding that
23 anything in the document is true. What the Court has been
24 assured by another one of your counsel was that the Court
25 should assume that everything in the document is untrue. How

1 did the Court get from untrue to true?

2 MS. CHRISTOFF: Your Honor, I would have used these
3 documents for this purpose regardless of what had happened
4 yesterday with Ms. Whaley. I'm using them for an entirely
5 distinct basis.

6 THE COURT: But to use them, though, you have to
7 introduce them into evidence. You've not introduced them into
8 evidence.

9 MS. CHRISTOFF: I'm not using them as evidence, Your
10 Honor. I'm using them to establish the fundamental
11 unreliability of the documents that the government is
12 submitting under the exception to the hearsay rule, for the
13 Court's determination.

14 THE COURT: And the Court can consider arguments of
15 counsel. The Court can consider the law. The Court can
16 consider the testimony of witnesses. The Court can consider
17 exhibits. Those documents don't appear to be -- even Sixth
18 Circuit law, they don't appear to be arguments of counsel,
19 they're not testimony in and of themselves, so they have to
20 come in for the Court to consider as exhibits. You're not even
21 offering them as exhibits.

22 MS. CHRISTOFF: I'm not, Your Honor.

23 THE COURT: So I don't know how the Court can
24 consider them, then. The only reason I was familiar with them
25 is because another one of your counsel said, "I'm not

1 introducing them for the truthfulness of the matter asserted,
2 and you can assume that everything in the documents are not
3 true."

4 So how do I get from untrue to true on something
5 that's not even an exhibit? How do I get there?

6 MS. CHRISTOFF: Your Honor, I'm not asking you to get
7 there. I'm not interested in using the documents --

8 THE COURT: So what evidence do I have to conclude
9 that this witness might be incorrect in saying that the
10 underlying information is reliable? What do I have to make
11 that conclusion?

12 MS. CHRISTOFF: Your Honor, there are e-mails that
13 are customer -- company documents.

14 THE COURT: I haven't seen them. Where are they?

15 MS. CHRISTOFF: I just showed them. They're not
16 evidence. The Court, of course, is not bound by the rules of
17 evidence in making admissibility determinations in order to --

18 THE COURT: Suppose you went out in the street and
19 you encountered a six-year-old and you had them write on a --
20 on one of these little chalk things that kids that that
21 everything that Mr. Seay wants to introduce is false and you
22 brought that in. Could I use that?

23 MS. CHRISTOFF: Of course the Court could, yes.

24 THE COURT: I could use it?

25 MS. CHRISTOFF: Absolutely. The Court is not bound

1 the rules of evidence in making admissibility exceptions.

2 THE COURT: We had a long speech today about the
3 history of the United States and the importance of the common
4 law and how we came. I think when I was appointed a judge, I
5 was named to be a servant of the people, not a king. I'm not
6 sure I can do whatever I want to do. I think there are some
7 limits on my authority.

8 MS. CHRISTOFF: I agree, Your Honor. The Congress
9 has defined those limits via Rule 104(a).

10 THE COURT: And I think the rules of evidence is one
11 source of the limitations that the Court has. I just don't
12 think I'm free to consider anything at all. I think the
13 circuit would have -- even the Sixth Circuit, would have a
14 great deal of difficulty if I did that. Okay. Anything else?

15 MS. CHRISTOFF: No, Your Honor.

16 THE COURT: Mr. Hamilton?

17 MR. HAMILTON: May I follow up with a few questions
18 so that the Court has a complete record of the nature of these
19 P&L documents and really kind of the history, a little bit, of
20 the summaries, how it got in here? May I ask the witness a
21 couple more questions?

22 THE COURT: You may.

23 DIRECT EXAMINATION (Continuing)

24 BY MR. HAMILTON:

25 Q So, Mr. Seay, to follow up on the questions from

1 counsel for Mr. Wombold, when you were -- were you requested
2 by counsel for the company to look into profits that were
3 generated by certain customers based on a request from the
4 United States Attorney's Office?

5 A Yes.

6 Q When you were doing that, did you review profit and
7 loss statements for customers?

8 A Yes.

9 Q And did that review include the documents that are
10 being summarized in the summaries at issue today?

11 A Yes.

12 Q When you were reviewing those, did you notice that
13 there were some discrepancies in those documents?

14 A I noticed that there were some manual rebates that
15 were not reflected in the customer P&Ls.

16 Q Could you slow down and say that? I'm sorry.

17 A I'm sorry.

18 Q Sure.

19 A I did notice that there were a few occasions where
20 the manual rebate was not reflected on the customer P&L.

21 Q And what does that mean?

22 A That means the profitability was overstated for that
23 customer for those particular periods.

24 Q Well, why -- what was the P&L used for in the direct
25 sales business -- in the direct sales unit?

1 A Commissions, is my understanding.

2 Q So whether or not the manual rebate amount was
3 included in the profit and loss statement, was the profit and
4 loss statement still used in the regular course of business by
5 the Pilot direct sales unit?

6 A Yes.

7 Q Did you also prepare another set-- We've looked at
8 one set of summaries. Did you earlier prepare a set of
9 summaries that took that into account?

10 A Yes. I treated it as two separate requests. One
11 request was to reflect the gallons and profitability as it
12 relates to the customer P&Ls that the sales team relied upon.
13 The other exercise was an accounting base from a corporate
14 level. So I tried to correct when I noticed those
15 discrepancies.

16 Q And the United States just marked at this time for
17 identification Collective Exhibit 4003, which is -- which is a
18 collection, in one -- in one document, summaries for
19 Amerifreight, BP, Halvor Lines, JTL Carriers, Ryder Truck, and
20 Queen Transportation. Mr. Seay, were these -- I'm going to
21 lay them right here on the document camera.

22 MR. VERNIA: Excuse me, Your Honor.

23 Mr. Hamilton, can you provide us with a copy?

24 MR. HAMILTON: Yes. I'm about to explain how these
25 were provided by asking the next question.

1 BY MR. HAMILTON:

2 Q Mr. Seay, were these the summaries that were
3 included with the March 27 letter from you to Mr. Harwell that
4 we've already looked at in court today?

5 A Yes.

6 Q All right. And were they detailed on Pages 5
7 through -- these particular summaries, were they detailed on
8 Pages 5 through 7, how -- let me point this -- you don't have
9 it in front of you.

10 A Yeah, I don't have the page numbers in front of me,
11 but...

12 Q So do you see a heading Customer Profit Summaries?

13 A Yes.

14 Q And looking down here, this is Page 5?

15 A Yes.

16 Q And does it go through Page 7 before we go to the
17 next category of Customer Profit Summary 2?

18 A Correct.

19 MR. HAMILTON: And for the record, this has been
20 marked for today's proceeding as 4001.

21 Your Honor, at this point, then, I'm going to advise
22 the Court that the defendants objected to these summaries.
23 That was the litigation surrounding Mr. Seay in September.
24 And the United States -- and the objection by the defendants
25 was that the summaries involved Mr. Seay's recalculations.

1 And the United States just said, "Well, we think the summaries
2 that were originally prepared do, in fact, have his
3 recalculations in them." But since the defendants objected to
4 those, what the United States did was, "All right. We'll just
5 base it on the P&Ls, the P&Ls themselves exclusively." And we
6 went with a different set of summaries, which is the summaries
7 that we're trying to admit into the evidence, which are
8 exclusively based on the P&Ls rather than Mr. Seay's
9 recalculations.

10 The United States is pleased to produce either one,
11 but it's the defendants who have put us in this situation.
12 And we question the fairness of that, under the circumstances.
13 In fact, the United States --

14 THE COURT: Is there some reason why the defendants
15 should be fair?

16 MR. HAMILTON: No. Absolutely not. No. Definitely.
17 I'm not suggesting that. What I am -- what I am suggesting is
18 that, if there is an issue with these summaries that the United
19 States has offered, that the United States just go back to the
20 original summaries that the defendants objected to, which
21 actually account for the issues that they're raising.
22 That's --

23 THE COURT: Well, the only objection I have now
24 pertained to the matters that Ms. Christoff conducted the voir
25 dire on --

1 MR. HAMILTON: Yes, sir.

2 THE COURT: -- and she conceded there was really no
3 evidence at all to contradict anything that the witness had
4 said. The e-mails that were used were allowed in court under
5 the express representation that they were not being offered for
6 the truthfulness of the matter asserted and the Court should
7 assume that everything in it was true [sic]. The Court relied
8 upon that representation, so the Court allowed the documents to
9 be displayed and used. And in that reliance the Court assumed
10 that no counsel would use them to assist or to argue that
11 anything in them were truthful unless they were introduced
12 through some other means. And they have not been introduced by
13 anyone else yet. So they still stand in the same light in
14 which they were first -- first mattered. There's been no other
15 evidence offered to the Court to suggest that the witness's
16 offer of the document is improper. So the Court will deny that
17 specific objection.

18 On another matter that Mr. Hamilton raised, I think
19 that's an issue that he and the defense will have to work out.

20 MR. HAMILTON: Yes, sir.

21 THE COURT: And I think there was another matter
22 someone wanted to bring up once the jury had left?

23 MR. HAMILTON: Your Honor, may I -- may I point just
24 one more thing out, which is --

25 THE COURT: You may point one more thing out.

1 MR. HAMILTON: Thank you, Your Honor. Well, I do
2 believe that it's the government's obligation to always be
3 fair. And one of the things that the Court asked Ms. Christoff
4 was the authenticity of that particular document. And I
5 will represent --

6 THE COURT: Which document?

7 MR. HAMILTON: Excuse me?

8 THE COURT: Which document?

9 MR. HAMILTON: The document -- the e-mail in
10 question, and that there is no basis for authenticity. I did
11 want to point out to the Court-- I didn't want to remain
12 silent on this. The parties have --

13 THE COURT: There were three.

14 MR. HAMILTON: Yes.

15 THE COURT: There was an objection yesterday by the
16 government --

17 MR. HAMILTON: Yes.

18 THE COURT: -- based on hearsay.

19 MR. HAMILTON: Right.

20 THE COURT: And in response to the objection, the
21 Court was told that the exhibit was not being offered for the
22 truthfulness of the matter asserted, and the Court accepted
23 that representation --

24 MR. HAMILTON: Yes, sir.

25 THE COURT: -- and allowed the document to be

1 displayed to the jury --

2 MR. HAMILTON: Yes.

3 THE COURT: -- and discussed by the witness. So, go
4 on now.

5 MR. HAMILTON: All I wanted to point out was, the
6 Court asked the counsel about the authenticity, and the parties
7 have stipulated to the authenticity of e-mails that were
8 disclosed. And I felt like, out of fairness, it was -- it
9 would be appropriate to point that out to the Court. I don't
10 want to ar- -- say anything else about it. I just wanted to--
11 Ms. Christoff didn't mention that, and I didn't want to remain
12 silent, that we're not suggesting that it's not authentic. We
13 have stipulated to that. So...

14 THE COURT: Was there something -- was there
15 something else someone wanted to bring up?

16 MS. CHRISTOFF: Um.

17 THE COURT: I thought earlier someone had said they
18 wanted to make a motion or an argument but they wanted to wait
19 until the jury was out at the end of the day? No?

20 THE COURTROOM DEPUTY: It was a document that you had
21 marked up, and then you wanted to --

22 THE COURT: If you've forgotten about it, that's
23 fine. We can move on.

24 MR. VERNIA: No, Your Honor. I did want to object on
25 relevance grounds to these documents as well. It's not clear

1 to us exactly what use they'll be put to.

2 As to something else that may have come up earlier
3 that I asked to delay, I -- Your Honor, I just have no
4 recollection of that. So --

5 THE COURT: Well, it will come to you later on, and
6 we have a lot of time to get to it.

7 MR. VERNIA: Oh, I know.

8 THE COURT: Okay.

9 MR. VERNIA: It wasn't actually me. I think it was
10 the criminal enforcement agreement language that Ms. Christoff
11 would like to discuss.

12 THE COURT: Okay.

13 MR. VERNIA: I'm feeling better already, Your Honor.

14 MR. HAMILTON: So should I respond to the relevance
15 argument first?

16 THE COURT: No. Ms. Christoff, I think she was the
17 one that actually mentioned it. She wanted to read into the
18 record, I think, some language out of the -- what is it called,
19 enforcement --

20 MS. CHRISTOFF: The criminal enforcement agreement
21 between Pilot Travel Centers, LLC, d/b/a, Pilot Flying J and
22 the United States, Your Honor. This is from Page 12, the
23 section entitled "Cooperation."

24 "The company acknowledges and understands that the
25 cooperation that it, along with the special committee

1 investigation, has provided to date with the criminal
2 investigation conducted by federal law enforcement, and its
3 pledge of continuing cooperation, are important and material
4 factors underlying the government's decision to enter into
5 this agreement. Therefore the company agrees to cooperate
6 fully and actively with the federal -- with federal law
7 enforcement in any and all matters relating to its
8 investigation of fraudulent conduct involving the sale of
9 diesel fuel.

10 "The company agrees that its cooperation shall
11 include, but is not limited to, the following: (A) The
12 company shall truthfully and completely disclose all factual
13 information with respect to its activities and those of its
14 present and former officers and employees concerning all
15 matters related to fraudulent conduct involving the sale of
16 diesel fuel about which the company has any knowledge or about
17 which federal law enforcement may inquire. This obligation of
18 truthful disclosure includes the obligation of the company to
19 assemble, organize, and provide in a responsive and prompt
20 fashion and upon request, on an expedited schedule, all
21 documents, records, information, and other evidence in the
22 company's possession, custody, or control, as may be requested
23 by federal law enforcement.

24 "This obligation of truthful disclosure includes the
25 obligation of the company to volunteer and provide to the

1 government any information and documents that come to the
2 company's attention that may be relevant to federal law
3 enforcement investigation and proceeding, and to provide any
4 testimony or information necessary to identify or establish
5 the location, authenticity, or other basis for admission into
6 evidence of documents or physical evidence in any criminal or
7 other proceeding, as requested by federal law enforcement.
8 This obligation of truthful disclosure also includes the
9 company's obligation to bring to federal law enforcement's
10 attention all criminal conduct by or criminal investigations
11 of the company or any of its supervisory employees and to
12 bring to federal law enforcement's attention any
13 administrative or regulatory proceeding or civil action or
14 investigation by any governmental authority that alleges fraud
15 by the company; and.

16 "(B) upon request of federal law enforcement with
17 respect to any issue relevant to its investigation, the
18 company shall designate knowledgeable employees, agents, or
19 attorneys to provide to federal law enforcement the
20 information and materials described in Paragraph 6(a) above on
21 behalf of the company.

22 "It is further understood that the company must at
23 all times provide complete, truthful, and accurate
24 information."

25 That's just a portion of Section 6. Thank you.

1 THE COURT: Thank you.

2 All right. If you want to take up the relevance
3 issue now, you may.

4 MR. HAMILTON: So the United States maintains that
5 these profit and loss summaries are relevant for the following
6 reasons: Mr. Seay has testified that the direct sales division
7 employees relied upon the profit and loss amounts -- or the
8 profit and -- I guess the profits from the customer to
9 determine the calculations in their -- for their commissions.

10 Let me state this another way. So the profits for
11 customers were determined, and that's the basis for the
12 commissions that the employees were paid. So the total profit
13 that they were using, really regardless of whether or not it
14 was accurate or not -- so here -- this is why these summaries
15 are accurate, and if they want to make the other summary --
16 why these summaries are relevant, and if they want to make the
17 other summaries relevant, they could be relevant, too, but
18 this set of summaries is relevant because they identified the
19 amount of profit upon which the commissions were actually
20 based, based on my understanding of Mr. Seay's testimony.

21 One of the narratives that's being constructed by
22 the defense is that, "Look, these employees really didn't make
23 that much money when they cheated customers."

24 MS. BREVORKA: Your Honor, I object to the-- The
25 witness should be out of the courtroom if they're going to make

1 arguments that talk about the defense's theories.

2 THE COURT: Mr. Hamilton?

3 MR. HAMILTON: I'm-- If we should excuse him, then--
4 I'm making a relevance argument, but I can -- I'll put it this
5 way --

6 THE COURT: Is there any need for additional
7 testimony from Mr. Seay?

8 MS. BREVORKA: Not from Mr. Hazelwood's perspective.

9 THE COURT: Okay. Thank you, sir. You can step
10 down. You can leave the courtroom.

11 THE WITNESS: Thank you.

12 MS. CHRISTOFF: Your Honor, we do have
13 cross-examination, but...

14 THE COURT: It's 5:30 now.

15 MS. CHRISTOFF: I just wanted to make sure he was not
16 excused.

17 THE COURT: I'm assuming he'll be back on our next
18 trial date. I don't think we're going to do much
19 cross-examination tonight, with the jury gone home.

20 MR. HAMILTON: All right. So what the government is
21 hearing is that one part of the defense's theory, all
22 defendants' theory -- well, mainly, I'd say, this is primarily
23 focused on Defendant Jones and Mann, whose percentage of -- who
24 had the lowest -- who had the lowest amount -- the lowest
25 multiplier against the commissions, so therefore every amount

1 that was withheld would result in a smaller increase in the
2 commissions.

3 So from -- what the government understands the
4 defense to be is that, when a customer's rebate was reduced,
5 they really didn't make that much from it. The government's
6 position is, that's only one side of the coin. And you'll
7 recall that the government has elicited testimony, I believe
8 from Mr. Ralenkotter as well as from Ms. Welch, which is the
9 following, which is, "No customer, no profit at all."

10 So, really, the lens through which you should look
11 at this is not so much how much they cheated the customer and
12 thinking about how much the defendants benefited from it, but
13 if you don't get -- let's say for example, if you don't induce
14 JTL to do business with you by lying to them, then they don't
15 do business with you at all, potentially, and so therefore you
16 have no commission upon which -- you have no profit upon which
17 to base your commission.

18 So, you know, our argument to the jury is, "Look,
19 you're not just looking at the amount of money that they
20 cheated them out of. You're looking at the total profit,
21 because you induced them to do business with Pilot on the
22 front end."

23 So that's why it's relevant, Your Honor.

24 MR. VERNIA: Your Honor, if I may?

25 THE COURT: You may.

1 MR. VERNIA: Thank you, sir. What I am trying to put
2 together is the testimony of Ms. Whaley yesterday, and
3 specifically with respect to my client, Ms. Jones, Exhibits
4 404, which is a compensation summary, and then 410, which are
5 the individual commission breakdowns. And I would simply point
6 out that part of my confusion from this stems from the fact
7 that the total profit on a company-by-company basis does not
8 appear on either of those documents. So in terms of how
9 Ms. Jones was paid, this is apples and oranges, Your Honor.

10 MR. HAMILTON: May I respond to that, Your Honor?
11 The difference here is that these are the companies that are
12 alleged as the example victims in the indictment. That's why
13 they were identified as being examples for purposes of summary.

14 If you look at the "Manner and Means" section of the
15 conspiracy where we identify example customers, which is --
16 which is customary, I believe, in an indictment of this
17 nature, where you can't identify every customer in an
18 alleged -- victimized in a conspiracy, we identified example
19 customers that -- and that's who these summaries relate to.
20 That's the difference. And that's why these summaries are
21 relevant, and why there's a different analysis as it relates
22 to the overall compensation picture for these individuals.
23 We're now focusing on particular customers that are identified
24 in the indictment.

25 THE COURT: I think that the indictment alleges two

1 ways that the fraud was committed. One way was, there was a
2 scheme and artifice to defraud. And another way, there was a
3 scheme to obtain money from others by means of false pretenses,
4 promises, and representations.

5 So looking at the indictment like that, there are
6 two ways to consider the loss. One is the gain to a
7 defendant. The second way is the loss to a victim. So even
8 assuming that a defendant does not receive any financial
9 benefit at all, if there's a loss to someone else, that would
10 still qualify under the statute. And it seems that what
11 Mr. Hamilton is saying is that the -- because the customer was
12 not receiving what the customer had been promised, the
13 customer still lost money, and this was one way of just
14 measuring that loss. Wouldn't that make it relevant, then?

15 MR. VERNIA: Well, Your Honor, I think the problem --
16 this may be too late in the day for my mathematical skills, but
17 I think the problem is that the profit that Pilot made or did
18 not make is not necessarily related to adjustments in rebates.
19 And if you look at the -- at 1522A, for example, for JTL
20 Carriers, there's three columns, the "Month," "Gallons," "Total
21 Profit." It seems to be suggesting to the jury that --
22 misleadingly so, that there was a direct correlation between
23 the gallons and the profit that had -- it was irrespective of
24 any other factors having to do with the purchase of the fuel,
25 the sale of fuel, the operations of the stores, et cetera.

1 I think Mr. Seay himself has testified already that
2 there are a number of factors. I assume that if the "Total
3 Profit" column was a negative number in there because Pilot
4 had been poorly run that month, but the -- the rebate had been
5 adjusted, Mr. Hamilton would not be making the argument that
6 that month --

7 THE COURT: In that case, there would not have been a
8 loss to the victim, though, right?

9 MR. VERNIA: Well, certainly there would have been --

10 THE COURT: If there is a plus, that means there is a
11 profit to profit and a loss to the victim; if there's a minus,
12 that means there's a loss to profit and a profit to the victim,
13 right?

14 MR. VERNIA: Your Honor, again, it may be too late in
15 the day for me to attempt the math, but I think that there are
16 a number of factors --

17 THE COURT: In a buyer-and-seller relationship,
18 somebody gains and somebody loses, so somebody gives up money
19 to get something else in return.

20 MR. VERNIA: Yes, sir.

21 THE COURT: And the profit is the delta between the
22 cost of production—and that includes everything—and the sales
23 price. And the more the sales price goes down, assuming that
24 the cost of production remains the same, you'd be selling it at
25 a loss. If you're selling at a loss, then that means that the

1 buyer is getting a profit, because he's buying something that's
2 worth more than he can get from anybody else.

3 MR. VERNIA: Well -- and maybe I'm mixing up my
4 terminology, Your Honor, but I believe that with respect to the
5 customer, the purchase -- his or her purchase price is a cost.
6 And whether they make a profit is, you know, subject to all the
7 other factors in their own business, how much they pay the
8 drivers, how much they have to pay for insurance.

9 And then, you know, looking narrowly at the question
10 of Pilot's profit, if Pilot had -- if Mr. Seay had done a poor
11 job, or Mr. Parent had done a poor job, and they had purchased
12 fuel -- I'm going to use exaggerated numbers here -- purchased
13 fuel for \$2 and had to sell it at a dollar, if Mr. Mosher had
14 defrauded the company by changing the amount of rebate for --
15 for four cents of that dollar, they would still have had a
16 loss, Pilot would still have suffered a loss. The loss would
17 have been less, because of Mr. Jones's [sic] actions, but I
18 think to that -- in that -- again, I may not be explaining my
19 thinking on this well, but I think the "Profit" column, in
20 that case, would really bear no resemblance to -- to what
21 actually happened to that customer as a result of Mr. Mosher's
22 actions.

23 THE COURT: Well, it still would, because the loss
24 would be a greater loss. The example that you gave, if you
25 purchased some fuel for \$2 and you're selling it at \$1, then

1 your loss is, what, 50 percent. And if somebody is doing
2 something improper that adds another 4 percent, then your loss
3 becomes 54 percent.

4 MR. VERNIA: Yes, sir.

5 THE COURT: I mean, there's still a loss there. If
6 you did that, though, what would happen would be, everybody
7 would buy your fuel from you, including TA and -- is it Love's?
8 The competitors?

9 MR. VERNIA: Love's, yes, sir.

10 THE COURT: They would be buying fuel from you, also,
11 and then they would turn around and sell it because they'd know
12 you'd be bankruptcy soon, and they would have bought all your
13 fuel at a tremendous discount.

14 MR. VERNIA: I guess my bottom-line point, Your
15 Honor, is, I think that there's a lot of factors that go into
16 that "Profit" column. And of course Mr. Mosher's fraud is
17 going to change that amount. But the amount of that change is
18 certainly not apparent from the raw numbers that appear in that
19 column right next to the gallons. That's the point I was
20 trying to make.

21 THE COURT: Okay. Thank you. Anything further?

22 (Brief pause.)

23 THE COURT: Well, try to avoid the snow, then, and we
24 shall see you on Wednesday morning.

25 (Evening recess.)